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## CURRENT EVENTS.

THE QUEEN'S JUBILEE YEAR.—On the 19th of June the Benchers of the Inner Temple celebrated the beginning of Queen Victoria's Jubilee year, her accession to the throne having taken place on the 20th of June, 1837.

The festivities, as accorded well with the antiquity of the venerable society under whose auspices they were conducted, were of an antique cast, the music was chiefly by the older composers, the songs were strictly "Old English," several of them Shakesperian, and the whole entertainment was in Tony Lumpkin's phrase, "in a concatenation accordingly."

The learned gentlemen have done well and honored themselves in thus honoring their Queen, for very few sovereigns, ancient or modern, have borne as staunchly, as the present Queen of England, "the fierce light that beats upon a throne."

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REFORMED PLEADING.—Every now and then there comes up a question whether an innovation in the law is really an improvement, and whether reformation in legal matters, really *reforms*. Some weeks ago we called attention to the doubt beginning to be entertained whether the "exemption" laws of the several States were really and truly such blessings to the industrious poor as they are generally held to be; and now comes a question whether the reformation of the forms of pleading which has been so general in all the States, has not done more mischief and injury to the due administration of the law than it has prevented. A contemporary says:

"The jury who, in the effort to squelch the defendant's counterclaim, the other day, extinguished the plaintiff himself by their blundering verdict of "no cause of action," afforded an amusing illustration of one of the inconveniences of the free pleading and commonly complex issues which the present procedure invites."

The old common law system of pleading was very faulty in many points of view, encumbered with many antiquated, obsolete, useless forms, and subjected the unwary to the peril of many snares and pitfalls. It needed, and could well bear, very thorough pruning and many alterations, but it had the root of the matter in it. A case well pleaded on both sides under the old system never failed to present the precise point in issue between the parties.

The case mentioned by our contemporary would indicate that the systems which have supplanted it in most of the States, have introduced an element of uncertainty arising from the fault opposite to that of the older system, that the craving for simplicity and brevity has carried our legislators and courts too far, and produced evils, different but hardly less serious than those which attended the desciples of Chitty. In arguing or deciding any question, the first, last, indispensable matter is to know precisely what that question is, and any system of pleading that does not always disclose it even to the unprofessional juror is faulty, and stands in need of further improvement and reformation.

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CRUELTY TO ANIMALS—CHARITABLE AND BENEVOLENT ASSOCIATIONS.—In a case recently decided in Massachusetts,[1] we find the first judicial exposition, which we have seen, of the precise legal *status* of societies for the prevention of cruelty to animals. These very praiseworthy organizations are to be found in most of our States and larger cities, but heretofore there seems to have been no occasion for their position to be judicially defined. It seems that the society in question had paid taxes to the amount of $205,60, and brought suit to recover it back upon the ground that its property was exempt from taxation, under the statute of Massachusetts which exempted from taxation the property of "literary, benevolent, charitable, and scientific institutions."

The court held that the society was both benevolent and charitable, and adds that it "comes within the definition of a charity. There is no profit or pecuniary benefit in it for any of its members. Its work, in the education of a mankind in the proper treatment

[1] Massachusetts Society for the prevention of cruelty to animals v. City of Boston, Sup. Jud. Ct. Mass., May 1886.

of domestic animals, is instruction in one of the duties incumbent on us as human beings. Those are charitable societies whose objects are to bring mankind under the influence of humanity, education and religion.[2]

The hospital founded by the institution would, if it were established by a bequest or public or private gift, be treated as a charity. It has a humane, legal and public or general purpose; and whether expressed or not in Stat. 43 Eliz., which is the foundation of our law on the subject of charities, is within the equity of that statute:[3] In the case of University of London v. Yarrow,[4] it was held that a bequest for founding and upholding an institution for investigating, studying and curing maladies of quadrupeds or birds useful to man, and for providing a superintendent or professor to give free lectures to the public, was good as a charitable legacy. The fact that the testator showed some interest in the animals themselves and their humane treatment in no way invalidated the gift."

The ruling in this case shows clearly that the functions of this society stand upon the same footing as bequests for public convenience, as for planting shade trees in cities,[5] or for education, as endowing a professorship, or an agricultural society, or for downright charity as for the relief of decayed merchants.[6]

[2] Jackson v. Phillips, 14 Allen. 539.

[3] Cresson's Appeal, 30 Penn. Stat. 437; Townsley v. Bedwell, 6 Ves. 194; Faversham v. Ryder, 27 Eng. Law & Eq. 369.

[4] 23 Beav. 159.

[5] Cresson's Appeal, 30 Penn. St. 437.

[6] *Ibid.*

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Mode of Examining Witnesses.—Every now and then somebody "bobs up serenely" with Sterne's celebrated *dictum:* "They manage these things better in France," which has been a *façon de parler* with travelled people, in England and America, for a hundred years past. This time it is a gentleman who, among other things, admires very greatly the French mode of examining witnesses.

He says: "But the greatest contrast between the French practice and ours is in the introduction of evidence and examination of witnesses. There are no arbitrary and technical rules of evidence, which more than any one cause impede and delay our administration of justice. No exceptions, and objections, and rulings; no confusing, and coaxing and bullying the witnesses by the different counsel, but a simple, quiet examination by the judge himself. It has been thought more conducive to the ends of justice, more likely to elicit the facts, for the judge, rather than the contending counsel, to examine the witness. And very justly, to my mind. The judge is impartial, the counsel are not. And if the witness is allowed to tell his own story to the judge, to submit only to his interrogations, he is far more likely to tell the truth than when alternately brow-beaten, confused, entangled, and coaxed by the opposing counsel."[2]

Upon this the *Columbia Jurist*, from which we take the foregoing, very justly remarks:

"A sufficient answer to this would appear to be that the endeavors of three examiners are more likely to ascertain the truth than one; that the witness is more likely to tell the truth if he knows that two men are watching to catch him in a lie; that if he is truthful he will not be confused or entangled; and that the examination of the judge if supplementary, will be more effective than if he is the sole examiner. Better bear the ills we have than fly to others that we know not of."

To this we may add, that of all the innovations upon the common law, which have been made, or advocated, or suggested of late years, that which least commends itself to our approval is that which involves the abrogation of the right to cross-examine an adversary's witness. Of course under the French system as indicated in the foregoing extract no such right exists, the counsel has no right even to examine his own witness, nor of course to cross-examine those who may testify at the instance of his adversary. Cross-examination has always been regarded by the most experienced of practitioners as the surest test of truth, the most effective means ever devised by the wit of man for the detection of falsehood. Some very experienced lawyers consider the test of cross-examination infallible. We were once told by a gentleman who had long held the office of prosecuting attorney and of course had extensive experience in handling witnesses of the shadiest type, that

he believed he could, if allowed full scope for cross-examination, detect and expose the most adroit and experienced of perjurers. We are of a different opinion. As the science of the burglar runs well abreast of that of the manufacturer of patent safes and vaults, so the ingenuity of the false witness moves *pari passu* with that of the most adroit of legal practitioners. There are liars who can outwit the most suspicious and most skillful of counsel, hoodwink the judge, and utterly bamboozle the jury.

There have been many improvements in the law of evidence within the last thirty or forty years, such as admitting the testimony of parties to the action, and parties interested in the result; these and any other really valuable and judicious reforms, we accept and zealously support, but we protest against any change which would in any degree tend to diminish the security against perjury afforded by our present practice.

## NOTES OF RECENT DECISIONS.

CRIMINAL PRACTICE—COMPETENCY OF JURORS—THE LEGAL EFFECT OF A "REASONABLE DOUBT"—JURY AS JUDGES OF LAW AS WELL OF FACT—DUTY OF COURT AS TO "DEGREES" OF CRIME—PRESUMPTION IN FAVOR OF LESSER GRADE OF OFFENCE AS WELL AS OF INNOCENCE. —In a recent case in the Supreme Court of Vermont,[1] all the foregoing important points of criminal law are discussed, and although the conclusions and rulings of the court evolve no principle which is not familiar to the experienced criminal lawyer, the clearness of the court's views and the precision and lucidity with which they are expressed, are worthy of special note.

The first question grew out of the fact that the jurors had read the newspaper accounts of the (alleged) murder, purporting to give the evidence upon the committing trial.

The ruling of the court upon this point is that if the opinions so formed by the jurors, whether expressed by them or not, did not, in the judgment of the jurors themselves, so bias their minds that they could not try the case impartially upon the evidence given in court, and return a verdict of acquittal or conviction thereon accordingly as their minds were convinced by it, they were competent. The opinion derived from newspaper information which will, in Vermont, disqualify a juror is thus stated by the court. "It must be an abiding bias of the mind, based upon the substantial facts in the case in the existence of which he believes. Such is the result of our decisions, and of the great majority of the decisions of courts of the last resort in other jurisdictions * * *. Its character must be left largely to the determination of the court before which the trial is had, upon the evidence adduced at the preliminary examination."[2]

A second question raised in this case was, whether the prisoner was entitled to an instruction, that if the jury entertain a reasonable doubt of his guilt, *it was their duty to acquit*. The trial court was held to have properly declined to instruct in the words we have italicised, but properly charged that if the jury entertained such a doubt, the prisoner was *entitled to the benefit of it*. The distinction is quite thin, for it is not easy to see how he could have the benefit of such a doubt except in the shape of an acquittal. The Supreme Court however regarded the difference as material, and thereupon moralizes as follows: "This is not an age in which the protection of the accused requires any lowering of this degree of doubt, which the law requires to be overcome in order to convict."

The right of the jury in a criminal case to judge of the law, irrespective of the charge of the judge, is thus broadly stated; "There is no qualification of the right of a jury, in a criminal cause, to disregard the law as given them by the court, and adopt their own theory; and they may, in the exercise of this power, with the same propriety adopt a rule of law more prejudicial to the respondent as well as one less prejudicial."

It was farther held to be the duty of a judge upon a trial for murder to explain to the jury the precise difference between murder in the first degree, and murder in the second degree, and that between the latter offence and manslaughter; that it was not sufficient to read or say to the jury after defin-

[1] State v. Meyer, S. C. Vt. 2 N. Eng. Rep. 209.

[2] State v. Meaker, 54 Vt. 112.

ing murder in the first degree, "that all other kinds of murder shall be murder in the second degree." It is the duty of the judge and the right of the prisoner to have explained to the jury in full the statute definitions of each of the three offences with which he stands charged.

In this case, the Supreme Court found it necessary to decide that it was error for the trial court to express the opinion that if the defendant was guilty at all, he was guilty of murder in the first degree. It is not a little remarkable that trial judges should so far forget what is their function, and what is the duty of the jury as to fall into an error so patent. On the presumptions of innocence, and of guilt respectively of the several degrees of the offence charged, the opinion of the court is singularly lucid and satisfactory.

"Under an indictment for murder, where the jury may convict the respondent of murder in the first degree, second degree, or manslaughter, the State, to convict of murder in the first degree, must first overcome by evidence the presumption of innocence that always shields the respondent till the contrary is proved beyond a reasonable doubt; and when that is overcome, the State must next overcome every reasonable doubt that the crime, which the respondent has committed, is not manslaughter nor murder in the second degree, advancing from the lesser to the greater crime, the presumptions being first in favor of innocence, and then of the lesser crimes in their order.

If, upon a proper explanation of murder in the first and second degrees, the jury might have had any reasonable doubt as to the degree of murder, the respondent was entitled to the benefit of it, as he was to the benefit of the reasonable doubt as to whether he is guilty of any crime at all under the indictment. And it is the duty of the trial judge to so fully instruct the jury upon every degree and kind of crime of which the respondent may be convicted under the indictment, as to give the respondent the benefit of having the evidence considered by the jury, under a full knowledge of the law as to the essential characteristics of each kind and degree of crime, for which a verdict may be returned against him, so that he may have the benefit of every reasonble doubt that may arise, both as to the commission of the crime and as to the kind and degree of it."

## WITHDRAWAL OF PLEA OF GUILTY.

The question, whether or not, one who is accused of crime and has entered a plea of guilty to the charge, has the right, as a matter of law and right, to withdraw such plea and enter the plea of not guilty, is one that has seldom been before the courts of last resort, and the adjudged law upon the question is but little. The weight of the learning and adjudications upon the subject seem to leave the whole determination of such an application to the tender mercies of the judicial discretion of the trial court.[1]

When, however, a proper showing of facts is made by way of affidavit, it will be universally conceded to be an abuse of judicial discretion to not allow the withdrawal of the plea of guilty and the plea of not guilty entered instead thereof. And this proper showing of facts is sufficiently made when the affidavit discloses that the affiant is not guilty of the crime charged;[2] that it is the first offense;[3] that the plea of guilty has been entered through inadvertence and without due deliberation, or ignorantly;[4] that it was from the hope that the punishment to which the accused would otherwise be exposed might thereby be mitigated,[5] or, when the plea is entered through mistake.[6] The statement is not made that all these averments are necessary to have the application granted, but only, that if all be made, the application will surely be granted, or the trial court greatly abuse a sacred trust.

*Cases Granting Application.*—In State v. Stevens[7] the question in the case is an application to withdraw plea of guilty. The application is refused by the trial court. The affidavits are in the record, as also a statement by the trial judge, which goes to the truthfulness of the facts alleged in the affidavit; but the difference in statement is upon an immaterial point. In this case the defend-

[1] What is it, that "judicial discretion" can not do? For an excellent article on the subject of "Judicial Discretion," see 17 Am. Law Review, p. 567.

[2] Mastronda v. State, 60 Miss. 87.

[3] Ibid.

[4] People v. McGrory, 41 Cal. 458; Gardner v. People, 11 Cent. L. J. 155; s. c. 4 Criminal Law Mag. 881.

[5] People v. McGrory, *Supra*; State v. Stevens, 11 Cent. L. J. 5; Davis v. State, 20 Ga. 674.

[6] Davis v. State, *Supra*.

[7] 11 Cent. L. J. 5; s. c. 71 Mo. 535.

ant entered the plea of guilty under the belief that by so doing a punishment less severe than the maximum would be inflicted. "Viewing the matter then, in either light," say the court, "we feel constrained to say that it would better have comported with the proper exercise of a sound judicial discretion, had the special judge permitted the withdrawal of the plea of guilty, and the entry, in its stead, of the usual plea. * * * * Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty in prosecutions for felonies to see that the prisoner has not made his plea by being misled, or under misapprehension or the like." Thus, it is said by Archbold in regard to this subject, that if instead of pleading not guilty, the defendant enter the plea of guilty, that such is a confession of the offense which subjects him to the same punishment as if he were tried and found guilty by verdict. "But as defendants often imagine that by pleading guilty they are likely to receive some favor from the court in the sentence that will be passed upon them, the judge very frequently undeceives them in that respect, and apprises them that their pleading guilty will make no alteration whatever in their punishment." [8]

Chief Justice Sherwood, after having reviewed the law and discussed the principles as set forth in some of our older books,[9] concludes his reasons for not sustaining the action of the trial court by a review of the modern authorities, and the conclusion is that, "The court should freely exercise its discretion in proper cases to allow the plea of guilty to be withdrawn and that of not guilty to be entered in lieu thereof. And even where the defendant, after pleading guilty, has moved in arrest of judgment, and that motion overruled, should justice require, the court should permit, before judgment rendered, a withdrawal of the plea of guilty and the substitution of the plea of not guilty." [10]

In State v. Colton[11] the defendant pleaded guilty and moved in arrest of judgment. He also moved that if judgment should not be arrested that he be permitted to withdraw his plea of guilty; and although the court regarded such a conditional motion as a novel one, yet, however, that it was one to be addressed to the discretion of the common pleas and was proper for their consideration and the consideration of the prosecuting officers.

In Gardner v. People[12] the defendant was under age and was unable to speak the English language. He pleaded guilty and was sentenced. He had no counsel. Later in the term, he appeared by counsel and made application for leave to withdraw the plea of guilty, but the application was overruled. The court say, that, "Under the peculiar circumstances of this case, we are of opinion this application should have been allowed, and that it was error to refuse it."

It is well for the courts to guard against imposition, the same as against its own abuse, and one should not be allowed to trifle with the court by deliberately entering a plea of guilty one day, and capriciously withdrawing it the next. "But when there is reason to believe that the plea has been entered through inadvertence and without due deliberation, or ignorantly and *mainly* from the *hope* that the punishment to which the accused would otherwise be exposed, may thereby be mitigated, the court should be indulgent in permitting the plea to be withdrawn." [13]

In Sanders v. State[14] the plea of guilty was forced upon the defendant through fear of mob violence. The counsel of the prisoner urged the plea from the same fear. Upon this plea of guilty, the defendant was sentenced and sent to the State's prison the same day. The relief prayed for in the appellate court is that the judgment entered upon the plea of guilty be vacated, the plea of not guilty entered and the defendant put upon his trial in due form of law. The judgment of the lower court was reversed, with instructions to vacate the judgment, to permit him to withdraw the plea of guilty and plead not guilty to the indictment.[15] If by reason of

[8] 2 Archbald 334; 2 Hawk, P. C. 469; 2 Hale, P. C. 225.

[9] Archbald, Hawk, and Hale. *Supra.*

[10] See also 1 Bishop. Crim. Proc. § 465.

[11] 4 Fostor (N. H.) 143.

[12] 4 Criminal Law Mag. 881: s. c. 17 Cent. L. J. 155.

[13] People v. McGrory, 41 Cal. 458.

[14] 85 Ind. 318; s. c. 16 Cent. L. J. 473; 4 Criminal Law Mag. 359.

[15] As a matter of information we would state that the defendant in this case, receive the same sentence

any side agreement with the prosecuting officer, a defendant under a criminal charge, enters a plea of guilty, a more severe sentence than that agreed upon should not be awarded; and if a sentence more severe than the one indicated be inflicted, the defendant should be allowed to withdraw his plea of guilty, and plead not guilty if he desires.[16]

Where there are several indictments or presentments pending against a defendant, and upon arraignment he pleads guilty by mistake, to one when he intended it to be to another, the error may be corrected, notwithstanding the entry has been made on the indictment or presentment and transferred to the minutes of the court.[17]

*Cases Denying the Application.*—In Conover v. State[18] the defendant's motion for leave to withdraw his plea of guilty was in writing and showed for cause that he was young and inexperienced in legal proceedings and did not enter the plea nor authorize the same to be done; that he was not guilty, as charged in the indictment. And in passing upon this application the court say: "The appellant's motion was addressed to the sound discretion of the criminal court, and unless the record showed a very clear abuse of such discretion, this court would not be authorized, we think, to review or reverse the decision below on such motion."

In Mastronda v. State[19] the defendant pleaded guilty to the charge of unlawful retailing of liquor, but before sentence had been passed upon him he moved the court for leave to withdraw his plea of guilty. The motion was overruled, and upon appeal, the action of the trial court was sustained. "The affidavit filed in support of his motion," say the court, "did not aver that he was innocent of the offense with which he was charged, but disclosed the fact that he was an old offender, who had, upon a previous occasion, pleaded guilty and escaped with the mildest penalty allowed by law. It set forth that he had been induced from this fact to believe that he would meet with equal leniency on this occasion, and had been, by this expectation, induced to enter his plea of guilty; but that he was now alarmed by a rumor that he was to be more severely dealt with, and, therefore, wished to withdraw his plea and take his chances before a jury. Certainly there was nothing in these statements to commend his application to the favorable consideration of the court. The action of the court property taught him that the infliction of the lowest penalty for a first offense, instead of conferring a vested right to the same measure of punishment for a second, rather suggests the propriety of so increasing the penalty that it may effectually deter from a recurrence of a third" The argument can be legitimately drawn from this language, that had the affidavit shown that the defendant, instead of being an old offender, was not guilty, and other averments of like comport, then and in that case the application should have been granted.

In United States v. Rayand[20] the defendants were indicted for violations of internal revenue laws, to which they entered pleas of guilty. The district attorney did not move for judgment until a subsequent term of the court, at which time the defendants made motion for leave to withdraw their pleas of guilty and substitute therefor the pleas of not guilty. The motion was denied.

In People v. Lennox[21] the defendant was accused by information, of the crime of murder. The defendant entered a plea of not guilty, then afterwards withdrew that plea and entered a plea of guilty, and upon that plea, the trial judge heard evidence and assessed the death penalty as the punishment. "Thereupon, and before the clerk had entered the judgment in the record, the defendant's attorney moved the court to permit the defendant to withdraw the plea of guilty, and to plead not guilty, on the ground that the defendant had been misled in withdrawing the plea of not guilty, and pleaded guilty. The reasons given in the record why the defendant deemed himself misled in pleading guilty, were because his father, a deputy sheriff, and his attorney expressed to him the

upon his pleas of not guilty, as he received upon his plea of guilty.

[16] State v. Kring, 71 Mo. 551; s. c. 2 Criminal Law Mag. 721; State v. Stevens, 71 Mo. 535; s. c. 11 Cent. L. J. 5.

[17] Davis v. State, 20 Ga. 674.

[18] 86 Ind. 99; s. c. 5 Criminal Law Mag. 140.

[19] 60 Miss. 87; s. c. 5 Criminal Law Mag. 460.

[20] 15 Reporter 200,

[21] 21 Cent. L. J. 213; s. c. 6 West Coast Repr. 691; 6 Criminal Law Mag. 796.

belief that if he pleaded not guilty, and was tried by a jury, the jury would find him guilty, and affix the death penalty; whereas if he pleaded guilty, they believed the court might, in the exercise of its judgment, fix the punishment at imprisonment for life. We see no error. * * * Not until the court had performed its duty of fixing the punishment did the defendant express any desire to reconsider his plea of guilty."[22]

*May Introduce Evidence on Motion.*—In Conover v. State,[23] the lower court heard evidence on the part of the State, contradicting the facts set forth in defendant's affidavit, and the court say in substance, that the lower court committed no error in permitting the State to introduce evidence on any of the matters presented by the motion.

*Statutes.*—Some statutes provide for the withdrawal of pleas of guilty, and permitting other pleas to be substituted therefor, but generally providing that such motions must be entered before judgment.[24] Some cases have been cited to the effect that after judgment, in no event, can the plea of guilty be withdrawn and the plea of not guilty substituted; but most of those cases are decided under statutes, which limit the time of withdrawing such pleas, and therefore can have no application to the general principle.[25]

We would conclude from an examination of all the cases upon the subject, that where there is an inducement of any kind held out to the prisoner, by reason of which he enters the plea of guilty, that it will, at all events, better comport with a sound judicial discretion, to allow the plea withdrawn, and the plea of not guilty entered, and especially so, when counsel and friends represent to the accused that it has been the custom and common practice of the court to assess a punishment less than the maximum upon such a plea; but of course we would admit as a restriction to this statement, the reasonable argument of the Mississippi court; for not to do so, would be to place a premium upon crime, confessed.

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[22] The burden of this case seems to be that after sentence is once passed, it is too late to withdraw the plea of guity.

[23] 86 Ind. 99; s. c. 5 Criminal Law Mag. 140.

[24] "At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted." Sec. 4362, McClain's Annotated Statutes, 1880. (Iowa).

[25] State v. Oehlslager, 38 Iowa 297; State v. Buck, 59 Iowa 382; s. c. 13 N. W. Rep. 342; 5 Criminal Law Mag. 460.

## CARRIAGE OF FREIGHT.

The functions of railroad companies in the transportation of merchandise are of such great legal as well as commercial interest, that a survey of the decisions upon the subject can hardly fail to be of benefit to the practitioner. The questions arising in this department of the law are of too great scope, however, to be discussed within the compass of an article like the present, while it is more useful as well as convenient to state the results of decisions whose basis and grounds will be sought in any event, by actual reference to the opinion. The succinct summary here given is therefore merely designed to guide the busy member of the profession to the sources of information and to suggest the *data* for investigation, though it is hoped it may be found productive of more practical advantage than more extended commentary always yields.

*Safe Transportation and Delivery.*—Railway Companies are insurers of the safe transportation and delivery of the property intrusted to them for carriage,[1] except as against loss or injury caused by the immediate act of God,[2] or of a public enemy.[3] But after a safe delivery of the goods in the proper warehouse of the company, and the consignee has had a reasonable time for tak-

[1] Fitchburg etc. N. M. Co. v. Hanna, 6 Grey, 539; Kiff v. Old Colony, etc. Ny. Co. 117, Mass. 591; s. c. 19 Am. Rep. 429; Read v. St. Louis etc. R. R. Co., 60 Mo. 199; Pruitt v. Hannibal etc. R. R. Co., 62 Id. 527; Chicago etc. R. R. Co. v. Ames, 40 Ill. 249; Illinois Cent. R. R. Co. v. Cobb, 64 Id. 128.

[2] Sweetland v. Boston etc. R. R. Co., 102 Mass. 276; Michalls v. N. Y. etc. R. R. Co., 30 N. Y. 564; Condict v. Grand Trunk Ry. Co., 54 Id. 500; Chicago etc. Ry. Co. v. Sawyer, 69 Ill. 285; s. c. 18 Am. Rep. 613; Railroad Co. v. Reeves, 10 Wall. 176.

[3] Thomas v. Boston etc. R. R. Co., 10 Met. 472; Phila. etc. R. R. Co. v. Harper, 29 Md. 330; Patterson v. North Car. R. R. Co., 64 No. Car. 147; Nashville etc. R. R. Co. v. Estis, 7 Heisk. Tenn. 622; Jackson v. Sacramento etc. R. R. Co., 23 Cal. 268; Compare Porchie v. North Eastern R. R. Co., 14 Rich. (So. Car.) 181; Ill. etc. R. R. Co. v. Mc. Clellen, 54 Ill. 58; Ill. etc. R. R. Co. v. Homberger, 77 Id. 457.

ing them away, the liability of the company as carrier ceases,[4] and it will hold the goods as a warehouseman only;[5] in which case the the company is bound to no more than ordinary care,[6] or such as a man of ordinary prudence would use in respect to his own property placed in like circumstances.[7]

*Continuance of Liability.*—The liability of a common carrier continues until the goods are unloaded;[8] and if they are destroyed by fire while yet in the car in the freight depot, the company is liable.[9] But in a recent case it has been held that a company is not liable for loss of goods accidentally destroyed by fire, without its fault or negligence, after they had been unloaded and placed in the company's warehouse, and notice given of their arrival.[10] A railroad company is under no obligation, as a common carrier, to deliver goods at a point beyond or off its own line of road,[11] but such a duty can be created by contract[12] or by a course of business warranting the presumption that the goods will be so delivered.[13]

*Providing Adequate Cars.*—It is the duty of the company to provide cars of sufficient strength;[14] another fact that the shipper knowingly permits his goods to be packed in an insufficient car does not exempt the company from liability,[15] unless he agrees to assume that risk.[16] But if the shipper personally superintends the loading of the car, the company will not be liable for a loss resulting from its being unskilfully or negligently done.[17]

*Carriage of Live-Stock.*—The rule requiring the company to provide cars of sufficient strength,[18] applies in respect of cars for the carriage of live stock,[19] as well as to those for the carriage of merchandise.[20] But in the carriage of live stock, in the absence of negligence the company is not liable for such injuries as occur in consequence of the vitality of the freight.[21] So that if one horse inflicts an injury upon another during transportation, the company is not liable, if the injury was caused by the peculiar propensities of the horse to fright or bad tempter, or by the fault of their owner in attaching their halters, or not removing their shoes.[22]

[4] See authorities cited in next note.

[5] New Jersey R. R. Co. v. Penn. R. R. Co., 27 N. J. L. 100; Culbreth v. Phil. etc. R. R. Co., 3 Houst. (Del.) 392; Mobile etc. R. R. Co. v. Prewitt, 46 Ala. 63; Mich. etc. R. R. Co. v. Shuntz, 7 Mich. 511; Derosia v. Winona etc., R. R. Co., 18 Minn. 133; Whitney v. Chicago etc. R. R. Co., 27 Wis. 327; Francis v. Dubuque etc. R. R. Co., 25 Iowa 60; Mohr. v. Chicago etc. R. R. Co., 40 Id. 579; Compare Hedges v. Hudson River R. R. Co., 6 Robt. 119; Southwestern R. R. Co. v. Felder, 46 Ga. 433; Railroad Co. v. Maine, 16 Kan. 333;

[6] Pike v. Chicago etc. R. R. Co., 40 Wis. 583.

[7] Pike v. Chicago etc. R. R. Co., 40 Wis. 583; Compare Brown v. Grand Trunk Ry., 54 N. H. 535.

[8] Chicago etc. R. R. Co. v. Bensley, 69 Ill. 630.

[9] Chicago etc. R. R. Co. v. Bensley, 69 Ill. 630; and see Winslow v. Vt. etc. R. R. Co., 42 Vt. 700; Rice v. Hart, 118 Mass. 201; Central R. R. Co. v. Smith, 54 Ga. 499.

[10] Hirschfield v. Cent. Pac. R. R. Co., 56 Cal. 484; Upon the strength of a statutory provision (Cal. Civ. Code § 2120) changing the liability of the company in such cases from that of a common carrier to that of a warehouseman; Ibid. And in another late case, where the goods were placed, on arrival upon the depot platform, and notice given to the consignee, who delayed removal, from difficulty in getting a drayman, until the goods were destroyed by fire on the second day, it was held that the company was not liable, even though the fire originated in a building erected by its permission on its premises; Chalk v. Charlotte R. R., 85 N. C. 423.

[11] Norway Plains Co. v. Boston etc. R. R., 1 Gray 263; People v. Chicago etc. R. R. Co., 55 Ill. 95; Cobb v. Railroad Co., 38 Iowa 601; and Compare Pinney v. Charlotte etc. R. R. Co., 66 No. Car. 34; Leavenworth etc. R. R. Co. v. Maris, 16 Kan. 333.

[12] Southern Express Co. v. McVeigh, 20 Gratt. 264; Cobb v. Railroad Co., 38 Iowa 601.

[13] Cobb v. Railroad Co., 38 Iowa 601; and see Baltimore etc. R. R. Co. v. Green, 25 Md. 72; Pittsburg etc. Ry. Co. v. Nash, 43 Ind. 423; Cuhn v. Mich. etc. R. R. Co., 71 Ill. 96.

[14] St. Louis etc. Ry. Co. v. Dorman, 72 Ill. 504; Sloan v. St. Louis etc. R. R. Co., 58 Mo. 220.

[15] Pratt v. Ogdensburgh etc. R. R. Co., 102 Mass. 557.

[16] Pratt v. Ogdensburg etc. R. R. Co., 102 Mass. 557; Compare Lee v. Raleigh etc. R. R. Co., 72 No. Car. 236; Illinois Cent. R. R. Co. v. Hall, 58 Ill. 409.

[17] Ross v. Troy etc. R. R. Co., 49 Vt. 364; East Tenn. etc. R. R. Co. v. Whittle, 27 Ga. 535; Chicago etc. R. R. Co. v. Shea, 66 Ill. 471; Clauber v. Ames. Express Co., 21 Wis. 21.

[18] See preceding subdivision of this article.

[19] See authorities cited in the note.

[20] Indianapolis etc. R. R. Co. v. Allen, 31 Ind. 394: Indianapolis etc. Ry. Co. v. Strain, 81 Ill. 504. Duty of railway companies to care for animals in course of transportation; see U. S. Rev. Stats. §§ 4386-4390.

[21] Penn. v. Buffalo etc. R. R. Co., 49 N. Y. 204; s. c. 10 Am. Rep. 355; Cragin v. N. Y. etc. R. R. Co. 51 N. Y. 61; Mich. Southern etc. R. R. Co. v. McDonough, 21 Mich. 165; s. c. 4 Am. Rep. 466; Blower v. Great Western Ry. Co., Law R. 7 Com. P. 655; Kendall v. London etc. Ry. Co., Law R. 7 Ex. 373.

[22] Evans v. Fitchburg R. R. Co., 111 Mass. 142; 15 Am. Rep. 19. For basis of foregoing paragraphs, and preceding subdivisions, see Boone Corp. § 258. In carrying of cattle at "owner's risk rates" limitation against liability held to apply only to carriage and not to refusal to deliver. Gordon v. Great W. R. Co., 45 L. T. N. S. 509; 25 Alb. L. J. 218. Liability of company for injury to sheep carried, caused by burning of material used by them, despite release in contract, where caused by negligence in not furnishing appliances against fire; Holsapple v. Rome etc. R. R., 86

*Limiting Liability.*—While a common carrier cannot exonerate himself from liability for his negligence or misfeasance, yet he may, by special agreement, fairly made, limit his common law liability, provided such limitation is reasonable and just, and does not contravene any laws or a sound public policy.[23] And in a recent case where in an agreement between a railway company and a shipper for the transportation of horses over the railway, there was a stipulation which provided that, as a condition precedent to his right to recover damages for any loss or injury to the horses while in transit, the shipper would give notice in writing of his claim therefor to some officer of the said railway company or its nearest station agent, before the horses were removed from the place of destination, or from the place of delivery to the shipper, and before such horses were mingled with other stock, it was held that the agreement is reasonble, and when fairly made, is binding upon the parties thereto.[24] So in another late case where a railroad company received merchandise to be transported to a point beyond its own law of railroad, over its own and other lines of roadroad connecting with it, and gave to the shipper its receipt, stating that the merchandise was shipped "at owner's risk," it was held that this receipt is a special contract limiting the liability of the carrier;[25] and that such connecting lines of railroad are entitled to the benefits of the exemptions from liability contained in it.[26]

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N. Y. 275. Compare succeeding subdivision on Limiting Liability.

[23] Sprague v. Missourri Pac. Ry. Co., (Kan.) 8 Pac. Rep. 465, and note, 469.

[24] Sprague v. Missouri Pac. Ry. Co., 8 Pac. Ry. Co., 465. Following Gaggin v. Kansas Pac. Ry. Co., 12 Kan. 416; See also Rice v. Kansas Pac. Ry. Co., 63 Mo. 314; Oxley v. St. Louis etc., Ry. 65 Id. 629; Dawson v. St. Louis etc. Ry. Co., 76 Id. 514; Express Co. v. Caldwell, 21 Wall. 264; Texas Cent. Ry. v. Morris, 16 Am. and Eng. R. R. Cas. 259, and cases there cited.

[25] Kiff v. Atchiston etc. R. R. Co., (Kan.) 4 Pac. Rep. 401.

[26] Kiff v. Atchison etc. R. R. Co., 4 Pac. Rep. 401. And that neither of the companies running such connecting lines is liable for damages to the merchandise transported, unless it is shown that such damages arise from the negligence of the company sought to be charged; Ibid. See also Steamboat Emily v. Carney, 5 Kan. 645; Mo. Pac. Ry. Co. v. Haley, 25 Id. 36; K. C. etc. R. Co. v. Simpson, 30 Id. 645; Whitworth v. Erie Ry. Co., 87 N. Y. 413; Shear. & Redf. Negl. § 12.

## CONSTITUTIONAL LAW—CORPORATION — REPEAL OF CHARTER — INJUNCTION—PUBLIC SERVICES.

### LOUISVILLE GAS COMPANY v. CITIZENS GAS-LIGHT COMPANY.

*Supreme Court of the United States, Dec. 1885.*

1. *Gas-Light Companies—Louisville Gas Company—Public Services*—The grant by the legislature of Kentucky, in 1869, to the Louisville Gas Company, for the term of twenty years, of "the exclusive privilege of erecting and establishing gas-works in the city of Louisville, and of vending coal gas-lights, and supplying the city and citizens with gas by means of public works," that is, by means of pipes laid in the streets and public ways of that city, constituted a contract, within the meaning of the national constitution, and was not forbidden by that clause in the bill of rights of Kentucky which declares that "all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." Within the meaning of that clause the services which the company undertook to perform were public services, affecting the interests and rights of the public generally.

2. *Right to Repeal or Amend Charter.*—By a general statute of Kentucky, passed in 1856, it was declared that "all charters and grants of or to corporations, or amendments thereof, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be expressed; provided, that while privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested;" also that the provisions of that statute shall only apply to charters and acts of incorporation to be granted hereafter." By an act passed in 1869, amendatory of the charter of the Louisville Gas Company of 1867, and granting the exclusive privileges before mentioned, it was provided that "no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company." *Held*, that the last act "plainly expressed" an intent that the charter of the company should not be subject to amendment or repeal at the mere will of the legislature, but only with the concurrence of the city council and the company's directors.

3. *Injunction.*—According to the principles announced in New Orleans Gas-Light Co. v. Louisiana Light, etc., Co., the Citizens' Gas-Light Company, incorporated in 1872, and endowed with the privilege of manufacturing and distributing gas in the city of Louisville, by means of pipes and mains laid in its streets and public ways, is not entitled to an injunction restraining the Louisville Gas Company from claiming and exercising the exclusive privileges granted by its charter.

In Error to the Court of Appeals of the State of Kentucky.

This is a writ of error to the highest court of Kentucky. The general question to be determined is, whether certain legislation of that commonwealth is in conflict with the clause of the National Constitution, which forbids a State to pass

any law impairing the obligation of contracts. The appellant, the Louisville Gas Company, contends that its charter, granting certain exclusive rights and privileges, constituted, within the meaning of that Constitution, a contract, the obligation of which has been impaired by the charter subsequently granted to the appellee, the Citizens' Gaslight Company. The Court of Appeals of Kentucky sustained as constitutional the legislation under the authority of which the latter company is exercising the rights, privileges, and franchises conferred by its charter.

By an Act of the General Assembly of Kentucky, approved February 15, 1838 (Sess. Acts 1837-38, p. 206), the Louisville Gas & Water Company was created a corporation, to continue for the term of thirty years from January 1, 1839. It was made its duty, within three years after its organization, to establish in Louisville a gas manufactory of sufficient extent and capacity to supply that city and its people with such public and private lights as might from time to time be required, and within five years after the establishment of its gas-works, to erect and establish water-works sufficient to supply the city with water for the extinguishment of fires, for the cleansing and sprinkling of streets and alleys, and for all manufacturing and domestic purposes; to which end it might lay down and extend pipes through any of the streets and alleys of the city, the company being responsible to the city for any damages resulting therefrom. The act imposed a limit upon the price to be charged for gaslights used by the city, and gave the latter the right to subscribe for 4,000 shares in the company, payment for one-half of which could be made in city coupon bonds for $200,000, redeemable at any time within three years after the expiration of the company's charter. It was made a fundamental condition that, upon the termination of the company's charter, the city at its election could take the gas and water works at a fair estimate of what they would cost and be worth at that time, to be ascertained by the judgment of competent engineers, selected by the parties, or, in case they disagreed, by the Louisville Chancery Court. Under this charter the company proceeded at once to erect gas-works, including suitable buildings and machinery. It supplied itself with all necessary apparatus, laid down mains and pipes, and erected lamp-posts, for the purpose of lighting the streets. It supplied gas for the public buildings and for street lights, as well as for domestic purposes. And it continued to do so during the term of its original charter.

By an act passed in 1842, the authority to erect water-works was withdrawn by the legislature. By an act entitled "An act to extend the charter of the Louisville Gas Company," approved January 1, 1867, and to continue in force for twenty years from that date, unless the city of Louisville should exercise its privilege of purchasing the works established under the authority of the original charter. That act created a corporation by the name of the "Louisville Gas Company," with a capital stock of $1,500,000. It provided, among other things, that such stock should consist, "First, of the stock of the present Louisville Gas Company, on the thirty-first of December, 1868, at par value; secondly, of the contingent fund and undivided profits that the company may own at the expiration of the present charter, said fund to be capitalized *pro rata* for the benefit of the present stockholders, except fractional shares, which shall be paid in cash; and, thirdly, new stock may be issued and sold by the new company, when required, to the extent of the capital stock, the sales to be made at public auction, after ten days' notice in the city papers; should said stock be sold above its par value, such excess shall not be capitalized or divided among the stockholders, but be employed in the first extensions made by the company after the sale of said stock;" that the business of the company should be to make and furnish gas to the city of Louisville and its residents; within two years after its charter took effect, should extend the gas distribution to Portland, and lay down mains, and erect street lights in certain named streets in that part of the city; should extend mains wherever the private and public lights would pay eight per cent. on the cost of extension, until its entire capital was absorbed in the gas-works and extensions—continuing the use of the pipes and conductors already laid down, and, with the consent of the city council, extending the pipes and conductors through other streets and alleys of the city. It was also provided that the company should put up gas-lamps at certain distances apart on the streets where there were mains, supply the same with gas, and light and extinguish the same, and charge the city only the actual cost thereof,—such charges not to exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, and the charges against other consumers not to be greater than the average price in said cities; that the stockholders, exclusive of the city of Louisville, should elect five directors, while the general council of the city should elect four; that the city might, upon the termination of the charter, purchase the gas-works at a fair estimate of what they would be then worth; and that the charter should be valid and in force when accepted by those who held the majority of stock in the old company, all of whose property should belong to the new company.

When the act of 1867 was passed, the city owned 4,985 shares of the stock of the old company. All the gas with which its streets were then lighted, or which was furnished to its people, was supplied by that company.

On the twenty-second of January, 1869, an act was passed amending that of January 30, 1867. Its preamble recites that the city of Louisville and the stockholders of the old company had ac-

cepted the extended charter, and desired that the amendments embodied in that act should become part of that charter. The amended charter repealed so much of the act of 1867 as allows a profit of eight per cent. on the cost of extensions, and, among other things, provides that the company shall extend its main pipes whenever the public and private lights, immediately arising from said extension, will pay seven per cent. profit on the cost thereof; that the company shall put lamp-posts, fixtures, etc., along the street mains, as they are extended, at a distance apart of about two hundred feet; shall keep the lamps in order, furnish gas, and light and extinguish the same. each light to have an illuminating power of about twelve sperm candles; shall furnish public lights to the city at actual cost, which shall in no event exceed annually $35 per lamp; that the charges to private consumers shall be so graded that the company's ptofits shall not exceed twelve per cent. per annum on the par value of the stock, ten per cent. of which may be drawn by stockholders in semi-annual dividends, and the remaining two per cent. to be laid out for extensions, not to be capitalized except at the end of five years. The fifth and sixth sections of the last act are as follows: "(5) That said gas company shall have the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuation of this charter, and of vending coal gas-lights, and supplying the city and citizens with gas by means of public works: provided, however, this shall not interfere with the right of anyone to erect, or cause to be erected, gas-works on their own premises, for supplying themselves with light. (6) That no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company."

By an act approved March 21, 1872, the Citizens' Gaslight Company of Louisville was incorporated for the term of fifty years, with authority to make, sell, and distribute gas for the purpose of lighting public and private buildings, streets, lanes, alleys, parks, and other public places in that city and its vicinity. It was authorized, the general council consenting, to use the streets and other public ways of the city for the purpose of laying gas-pipes, subject to such regulations as the city council might make for the protection of the lives, property, and health of citizens. That body did so consent by ordinance passed December 13, 1877.

The Louisville Gas Company having claimed that the foregoing section of the act of January 22, 1869, granting the exclusive privileges therein defined, constituted a contract, the obligation of which was impaired by the charter of the plaintiff, and that the latter's charter was therefore void, the present suit was brought by the Citizens' Gaslight Company in the Louisville Chancery Court for the purpose of obtaining a perpetual injunction against the assertion of any such exclusive privileges, and against any interference with the plaintiff's rights as defined in its charter. Among the rights asserted by the latter under its charter was "to make, sell, and supply coal gas for lighting the public buildings and other places, public and private," in Louisville and the adjoining localities, by means of pipes laid in the public ways and streets. The court of original jurisdiction dismissed the suit. Upon appeal to the Court of Appeals, the decree was reversed, with directions to issue a perpetual injunction restraining the Louisville Gas Company from claiming and exercising the exclusive right of manufacturing and supplying gas to the city of Louisville and its inhabitants.

*Thomas F. Hargie*, *John K. Goodloe* and *John G. Carlisle*, for plaintiff in error; *John Mason Brown*, *George M. Davie*, and *Wm. Lindsay*, for defendant in error.

Mr. Justice HARLAN, after stating the facts of the case in the foregoing language, delivered the opinion of the court:

Two of the judges of the State court held that the clause of the bill of rights of Kentucky, which declares that "all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services" (Const. Ky. 1799, art. 10, § 1; 1850, art. 13, § 1), forbade the general assembly of that commonwealth to grant to a private corporation the exclusive privilege of manufacturing and distributing gas, for public and private use, in the city of Louisville, by means of pipes and mains laid under the streets and other public ways of that municipality. The other judges were of opinion that that clause did not prohibit a grant by the State to a private corporation, whereby certain privileges were conferred upon the latter in consideration of its discharging a public duty, or of rendering a public service; that the municipality of Louisville being a part of the State government, there was a public necessity for gaslights upon its streets and in its public buildings, almost as urgent as the establishment of the streets themselves; that the services thus to be performed by the corporation were, in the judgment of the legislative department, an adequate consideration for the grant to it of exclusive privileges; and, consequently, that the grant was a contract, the rights of the parties under it to be determined by the rules applicable to contracts between individuals.

While the judgment below, in view of the equal division in opinion of the judges of the State court, does not rest upon any final determination of this question by that tribunal, it cannot be ignored by us; for, at the threshold of all cases of this kind, this court must ascertain whether there is any such agreement on the part of the State as constitutes a contract within the meaning of the Constitution of the United States. If the services which the gas company undertook to perform, in consideration of the exclusive privileges granted

to it, were public services, within the meaning of the bill of rights of Kentucky, then the grant of such privileges was not forbidden by the State Constitution. In New Orleans Gaslight Co. v. Louisiana, etc. Co., just decided, it is held that the supplying of gas to a city and its inhabitants by means of pipes and mains laid under its public ways, was a franchise belonging to the State, and that the services performed as the consideration for the grant of such a franchise are of a public nature. Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas-lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the Constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question. This conclusion is justified, we think, by the decisions of the Court of Appeals of that State. In O'Hara v. Lexington & O. R. Co., 1 Dana, 232, the point was made that an inquisition for the assessment of damages for the taking of land by a railroad corporation was void upon certain grounds, one of which was that the company's charter granted exclusive privileges, without any consideration of public services. Chief Justice Robertson, speaking for the court, said that, in the true sense of the Constitution, no exclusive privileges were granted to the corporation; observing that "if the charter be on that ground unconstitutional, it would be difficult to maintain the validity of any statute for incorporating any bridge company or any bank, or even for granting a ferry franchise."

But the principles announced in Gordon v. Winchester, 12 Bush, 114, seem more directly applicable to the present case. Judge Cofer, speaking for the whole court, after observing that there were unquestionably cases in which the State may, without violating the Constitution, grant privileges to specified individuals, which from the nature of the case could not be enjoyed by all, and in respect of which the State could designate the grantee, said: "But in all such cases the person, whether natural or artificial, to whom the privilege is granted, is bound, upon accepting it, to render to the public that service the performance of which was the inducement to the grant; and it is because of such obligation to render service to the public that the legislature has power to make the grant." In illustration of this principle, he proceeds to say: "Permission to keep a tavern or a ferry, to erect a toll-bridge over a stream where it is crossed by a public highway, to build a mill-dam across a navigable stream, and the like, are special privileges, and, being matters in which the public have an interest, may be granted by the legislature to individuals or corporations; but the grantee, upon accepting the grant, at once becomes bound to render that service to secure which the grant was made; and such obligation on the part of the grantee is just as necessary to the validity of a legislative grant of an exclusive privilege as a consideration, either good or valuble, is to the validity of an ordinary contract. Whenever, by accepting such privilege, the grantee becomes bound, by an express or implied undertaking, to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be; for the legislature being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them to be. But when they can see that the grantee of an exclusive privilege has come under no obligation whatever to serve the public in any manner, in any way connected with the enjoyment of the grant, it is their duty to pronounce the grant void, as contravening that provision of the bill of rights which prohibits the granting of exclusive privileges, except in consideration of public services." These observations were made in a case in which it was held that a statute giving a building association the right to receive a greater rate of interest than was allowed by the general law was unconstitutional, in that it conferred exclusive privileges not in consideration of any public services to be performed.

In Com. v. Bacon, 13 Bush, 212, the question was as to the constitutionality of an act giving a strictly private corporation, which owed no duty to the public, a monopoly of an ordinary business in which every citizen was entitled to engage upon terms of equality. Its validity was attempted to be sustained on the same principle upon which the grant of ferry privileges was upheld. But the act was held to be unconstitutional; the court, among other things, saying: "Ferries are parts of highways, and the government may perform its duty in establishing and maintaining them through the agency of private individuals or corporations, and such agencies are representatives of government, and perform for it a part of its functions. And in consideration of the service thus performed for the public, the government may prohibit altogether persons from keeping ferries and competing with those it has licensed. The establishment of public highways being a function of government, no person has a right to establish such a highway without the consent of the government; and hence, in prohibiting unlicensed persons from keeping a ferry, the goverment does not invade the right of even those who own the soil on both sides of the stream."

In the later case of Com. v. Whipps, 80 Ky. 272, where the validity of a statute of Kentucky authorizing a particular person to dispose of his property by lottery was assailed as a violation of the before-mentioned clause in the bill of rights, Pryor, J. (Chief Justice Lewis concurring), said: "This constitutional inhibition was intended to prevent the exercise of some public function, or an exclusive privilege affecting the interests and rights of the public generally, when not in consideration of public service; and if made to apply to the exercise of mere private rights or special privileges, it nullifies almost innumerable enactments that are to be found in our private statutes, sanctioned in many instances by every department of the State government."

The precise question here presented seems not to have been directly adjudicated by the highest court of the State. But, as the exclusive privileges granted to the Louisville Gas Company affected the rights and interests of the public generally, and related to matters of which the public might assume control, we are not prepared to say that the grant was not in consideration of public services, within the meaning of the Constitution of Kentucky. We perceive nothing in the language of that instrument, or in the decisions of the highest court of that commonwealth, that would justify us in holding that her legislature, in granting the exclusive privileges in question, exceeded its authority.

2. On behalf of the Citizens' Gaslight Company, it is contended that the charter of the Louisville Gas Company, granted January 30, 1867, and amended by the act of January 22, 1869, was at all times subject to alteration or repeal at the pleasure of the legislature. Assuming that the act of 1867 was not a prolongation of the corporate existence of the original Louisville Gas Company, but created a new corporation by the same name, it is clear that such charter was granted subject to the provisions of a general statute of Kentucky enacted on the fourteenth of February, 1856, entitled "An act reserving power to amend or repeal charters and other laws." That statute is as follows: "Section 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: provided, that while privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested. Sec. 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease, by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid. Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage."

The language of this statute is too plain to need interpretation. It formed a part of the charter of the new Louisville Gas Company when incorporated in 1867, and the right of the legislature, by a subsequent act, passed in 1872, to incorporate another gas company to manufacture and distribute gas in Louisville, by means of pipes laid, at its own cost, in the public ways of that city, so far from impairing the obligation of defendant's contract with the State, was authorized by its reserved power of amendment or repeal, unless it be that the act of January 22, 1869, "plainly expressed" the intent that the charter of the new Louisville Gas Company should not be subject to amendment or repeal at the mere will of the legislature. The judges of the State court all concurred in the opinion that no such intent was plainly expressed. As this question is at the very foundation of the inquiry whether the defendant had a valid contract with the State, the obligation of which has been impaired by subsequent legislation, we cannot avoid its determination. Whether an alleged contract arises from State legislation, or by agreement with the agents of a State by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment, and independently of the adjudication of the State court, to decide whether there exists a contract within the protection of the Constitution of the United States. Jefferson Branch Bank v. Skelly, 1 Black, 436; Wright v. Nagle, 101 U. S. 794; Railroad Co. v. Palmes, 109 U. S. 257; S. C., 3 Sup. Ct. Rep. 193. After carefully considering the grounds upon which the State court rests its conclusion, we have felt constrained to reach a different result. We are of opinion that the act of 1869 plainly expresses the intention that the company should enjoy the rights, privileges and franchises conferred by the act of 1867, as modified and extended by that of 1869, without its charter being subject to amendment or repeal at the will of the legislature. In ascertaining the legislative intent, we attach no consequence to the negotiations between the Louisville Gas Company and the city council of Louisville as to the provisions to be embodied in any amended charter giving the company exclusive privileges from January 1, 1869; for the words of the act of 1869 being, in our opinion, clear and unambiguous, effect must be given to them according to their ordinary signification. The clause in that act declaring that "no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company," plainly expresses, as we think, the intention that the company's charter should not, as provided in the statute of 1856, be amended or repealed "at the will of the legisla-

ture." When the legislature declared that there shall be no alteration or amendment without the concurrence of the city council and the directors of the company, it must have intended to waive, with respect to that company, its absolute power reserved by the act of 1856, of amending or repealing charters of incorporations thereafter granted. The language used is wholly inconsistent with any other purpose than to withdraw the charter of that particular company from the operation of the act of 1856, so far as to make the right of amendment or repeal subject, not to the mere will of the legislature, but, in the first instance, to the concurrence of the city council and the directors of the gas company. If there can be no amendment or repeal without the concurrence of the city council and the directors of the company, then it cannot be said that such amendment or repeal depends entirely upon the will of the legislature, as declared in the act of 1856. It was as if the legislature had said: "As the municipal government of Louisville and the company are agreed, the latter may enjoy the rights, privileges and franchises granted by its charter for the whole term of twenty years, unless before the expiration of that period the city council and its directors concur in asking alterations or amendments, which will be made if, in the judgment of the general assembly, the public interests will be thereby promoted."

3. But it is argued that, as the defendant's charter of 1867 conferred upon it no exclusive privileges, the granting of such privileges in the act of 1869 was without consideration, and is to be deemed a mere gratuity. To this it is sufficient to answer that, apart from the public services to be performed, the obligations of the company were enlarged by the act of 1869, and its rights under that of 1867 materially lessened and burdened in the following particulars: The amended charter limited the profits of the company to twelve per cent. per annum on the par value of its stock, two per cent. of which were required to be used for extensions, and not to be capitalized except at the end of each five years, while under the original charter the only limitation upon the prices to be charged private consumers was that they should not exceed the average charges in Philadelphia, Baltimore, Cincinnati, Chicago and St. Louis; the amended charter limited the amount to be annually charged the city per lamp to $35, no matter what its actual cost was, while under the original charter the company was entitled to charge the city for the actual cost of supplying, lighting and extinguishing lamps, not, however, exceeding the average charges in the before-mentioned cities; and by the amended charter the company was required to extend its mains when its income from lights would amount to seven per cent. on such extensions, while under the original charter such extensions were not required unless its income therefrom would pay eight per cent. These concessions upon the part of the company seem to be of a substantial character, and constituted a sufficient consideration to uphold the grant of exclusive privileges. If the consideration appears now to be inadequate upon a money basis, that was a matter for legislative determination, behind which the courts should not attempt to go.

4. These preliminary matters being disposed of, and without referring to some matters discussed by counsel, but not fairly arising on the pleadings or in any evidence in the cause, it is clear that, upon the main issue, this case is determined by the principles announced in New Orleans Gaslight Co. v. Louisiana Light, etc., Co., just decided. For the reasons there stated, and which need not be repeated here, we are of opinion that the grant to the Louisville Gas Company by the act of January 22, 1869, amendatory of the act of January 30, 1867, of the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuance of its charter, and of vending coal gas-lights, and supplying that municipality and its people with gas by means of public works—that is, by means of pipes, mains, and conduits placed in and under its streets and public ways, constituted a contract between the State and that company which was impaired by the charter of the Citizens' Gaslight Company. The charter of the latter company is therefore inoperative, in respect of these matters, until, at least, the exclusive privileges granted the Louisville Gas Company cease, according to the provisions of its charter. As the object of the plaintiff's suit was to obtain a decree enjoining the defendant from claiming and exercising the exclusive privileges so granted to it, the judgment of the Louisville Chancery Court dismissing the bill should have been affirmed by the Court of Appeals. The judgment of the latter court, reversing that of the court of original jurisdiction, is itself reversed, and the cause remanded for further proceedings not inconsistent with this opinion:

Reversed.

NOTE.—While it is settled beyond cavil that a private charter is a contract between the legislature and the corporation, within the meaning of the constitutional prohibition against State legislation impairing the obligation of contracts, it is equally a recognized principle of law that the State may reserve the right to repeal, alter, or amend the charter (in respect to corporations created thereafter), and that when this is done, a subsequent repeal, alteration, or amendment does not fall within the constitutional objection, inasmuch as that provision becomes a condition of the grant and one of the terms of the contract.[1] The importance of this reservation, from the possible results

[1] Tomlinson v. Jessup, 15 Wall. 454; Miller v. State, 15 Wall. 478; Holyoke v. Lyman, 15 Wall. 500; Sherman v. Smith, 1 Black (U. S.) 587; Chincleclamouche Lumber Co. v. Comm., 100 Pa. St. 438; State v. Person, 32 N. J. L. 134; Perrin v. Oliver, 1 Minn. 202; Gardner v. Hope Ins. Co., 9 R. I. 194; Comm. v. Fayette Co. R. R., 55 Pa. St. 452; Miners' Bank v. United States, 1 Greene (Iowa) 553.

of irresponsible action on the part of great corporations, began to be felt at an early day. In fact (as remarked by Chief Justice Waite, in Spring Valley Water Works v. Schottler,[2] as soon as the decision in the Dartmouth College case gave the sanction of the supreme federal tribunal to the inviolability of charters, many of the States began to act on the suggestion of Mr. Justice Story in that case, and to reserve the power to alter and repeal. The right to alter and amend is said to include authority both to withdraw powers granted to the corporation and to confer new powers upon it and require their exercise.[3] But on the other hand, "under the pretence of amending its charter, the legislature cannot compel a company to embark upon a new enterprise radically and essentially different from that contemplated in the original grant of corporate franchises."[4] Where two railroads, each incorporated under a statute containing no reservation of the right to alter or repeal, are consolidated, the new corporation is amenable to the provisions of a law passed in the meantime expressly reserving that power.[5] The power of revocation may be reserved in the constitution of the State, in force when the corporation is organized, and in that case it need not be repeated in the charter.[6] And where several charters are contained in one act, it is enough if the power of repeal be reserved in any part of the same act, provided the language of the clause is sufficient to embrace the whole act.[7] Of course the State is not prohibited from altering a charter, even in its most material features, if the changes are accepted and agreed to by the corporation.[8] And the assent of a corporation to legislative changes in its charter may be inferred from such circumstances as would raise a similar presumption in the case of a natural person.[9]

And further it must be observed that this constitutional immunity from legislative interference cannot be carried so far as to relieve the corporation from the proper and reasonable control of the State, in cases where its franchises have been perverted or abused, or the rights of third persons are in danger of being compromised through its actions. "While private charters are thus protected, it is also true that corporations, like natural persons, are subject to those regulations which the State may prescribe for the good government of the community. There is no reason why corporations should not be subject to police regulations as well as natural persons.[10] To the same effect are the remarks of Mr. Justice Harlan in Chicago Life Ins. Co. v. Needles.[11] "The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. * * * Equally implied in our judgment is the condition that the corporation should be subject to such reasonable regulations in respect to the general conduct of its affairs as the legislature may, from time to time, prescribe, which do not materially interfere with, or obstruct the substantial enjoyment of the privileges of the State has granted, and serve only to secure the ends for which the corporation was created." And see Bank of the Republic v. Hamilton,[12] Mobile & c. R. R. v. State,[13] Louisville &c. Co. v. Ballare.[14] So a law which gives a workman, employed by a sub-contractor on a railroad, the right to recover against the corporation, applies to existing companies and is not unconstitutional.[15]

And "there is no implied contract between a State and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of the franchise more burdensome or less lucrative, any more than there is between the State and an individual that the laws existing at the time of the acquisition of property shall remain perpetually in force." Day, J., in Rodemacher v. Railroad.[16] Finally, when the legislature limits its power to impose any further duties, liabilities, or obligations on a corporation, it does not restrict its power to make enactments as to the mode, the time when, and the courts where, such liabilities shall be enforced.[17]

H. CAMPBELL BLACK.

2 110 U. S. 352.
3 Worcester v. Norwick &c. R. R. 109 Mass. 103.
4 Ames v. Railroad, 21 Minn. 255.
5 Shields v. Ohio, 95 U. S. 319.
6 Delaware Railroad v. Tharp, 5 Hurringt. 454.
7 Ferguson v. Bank, 3 Sneed, 609.
8 Ehrenzeller v. Union Canal Co., 1 Rawle, 190.
9 Comm. v. Cullen, 13 Pa St. 132.
10 Gorman v. Pacific Railroad, 26 Mo. 450.
11 113 U. S. 580.
12 21 Ill. 53.
13 29 Ala. 573.
14 2 Met. (Ky.) 165.
15 Granahan v. Railroad, 30 Mo. 546.
16 41 Iowa, 301.
17 Gowen v. Railrond, 44 Me. 141.

## CRIMINAL LAW— LARCENY.

### REGINA v. ASHWELL.

*Court for Crown Cases Reserved. Dec. 5, 1885.*

The prisoner asked one K. to lend him a shilling, and K. gave him what he supposed to be a shilling, but which was in fact a sovereign. The prisoner changed the sovereign, kept the change, and when told by K. of the mistake, denied receipt of the sovereign, but afterwards admitted that he had the sovereign and had spent half the money. *Held*, larceny.

This case had been twice argued, on the first occasion on the 20th of March, before five judges, who, being divided in opinion, directed it to be re-argued before all the judges, which took place on the 13th of June last, when, being still divided in opinion, they took time to consider their judgment. The case raised a highly technical point in the law of larceny. The point was shortly this, whether, if a man hands another a sovereign for a shilling, and the other seeing it in a short time, though not at the moment, keeps it, he can be convicted of stealing it. The case, which was reserved by Denman J., at the assizes at Leicester in January last, was shortly stated this, that the prisoner asked one Keogh to lend him a shilling, and Keogh put his hand in his pocket and pulled out what he believed to be a shilling, but what was in fact a sovereign, and handed it to the prisoner, who went away, and in an hour afterward

changed it and kept the change, and next day when Keogh told him of the mistake, denied the receipt of the sovereign, and gave contradictory accounts as to where he got the sovereign, but afterward admitted that he had the sovereign and had spend half the money. It was objected that there was no larceny, as there was no evidence that the prisoner, when he received the coin, knew it to be a sovereign. The jury found that the prisoner did not know it at the time, but that he discovered it "soon" afterward, and fraudulently appropriated it, knowing that the owner had not intenden to part with it.

Several of the judges before whom the case had been argued were not able to be present, and their judgments were read by others. It will be seen that seven judges were for affirming the conviction, and seven were for reversing it; and the rule of this court being that the presumption is to be in favor of the conviction—*presumitur pro negante*—the conviction was affirmed.

SMITH, J., delivered his judgment to the effect that it was not a case of stealing, as stealing must be a taking against the will of the owner, with a felonious intent at the time of the taking. For this he cited authorities. In the present case it seemed to him that there was no taking against the will of the owner, nor with a felonious intent, and the case he thought came within the law as laid down by the judges in Reg. v. Middleton, L. R., 2 C. C. R. 45, that the prisoner must have been aware of the mistake at the time of the taking in order to render him guilty of felony. It was not, he thought, a mere case of finding, for Keogh delivered the coin to the prisoner who took it honestly. It was a confusion of terms to suppose the finding out of the mistake some time after the taking made it like a case of finding, knowing the owner or knowing he might be found. He did not think the cases cited for the prosecution, Cartwright v. Green. 8 Ves. 405; Merry v. Green, 8 M. & W. 623, were in point. In those cases there was no intenlion to deliver the thing, here there was, and the prisoner was not guilty of larceny at common law. And as to his liability as bailee, it was necessary that the thing should have been delivered as a bailment, whereas here it was not, and there was no condition expressed or implied to return the coin delivered. The real obligation on the prisoner was to return 19s when he found the coin was a sovereign, but he was not bound to return the sovereign. He came, therefore, to the conclusion that the conviction ought to be quashed.

CAVE, J.'s judgment, (which was read by the Lord Chief Justice, he being unable to attend,) was to the contrary effect as to larceny at common law. It was impossible, he thought, that the prisoner, who at the moment of taking the coin was under a mistake as to what it was, could be guilty of taking it feloniously. As there was a mistake as to the coin, no property passed; and the question was as to possession, as to which he thought the person taking the thing could not acquire possession of it until he found what it was. Here the prisoner, when he took the coin, was not aware what it was, and did not become aware of it until afterward. He was unable to reconcile the cases, and thought the law correctly laid down in Merry v. Green, 7 M. & W. 623. In his judgment a man could not be presumed to assent to the possession of a thing until he knew what it was, and here the prisoner did not assent to the possession of the coin until he knew it was a sovereign. He had consented to the responsibility of the possession only of a shilling. In this case the prisoner did not at the time of taking, render himself responsible for the possession of a sovereign, and therefore could not set up a lawful possession of it, for at the moment he knew what it was he elected fraudulently to keep it, and therefore was guilty of larceny at common law.

MATHEW, J., declared that he was of the same opinion as Smith, J., that is, that the prisoner was not guilty of larceny. There was no dishonest act in the taking, and it would not do, he thought, by a sort of fiction to refer the taking to the time of changing the sovereign. And certainly, even if that was a taking, it was not a felonious taking, for he might honestly have changed the coin, and it would only be dishonest if he meant to keep the whole. In his view there was no evidence of a felonious taking at any time; and if this conviction could be supported, then any one guilty of any dishonesty could be convicted of larceny. That was a change in the law which could only be effected by statute. He thought, therefore, that the conviction should be quashed.

STEPHEN, J., read a lengthy and elaborate judgment, in which he said, Day and Wills, JJ., concurred, to the same effect. From the earliest time, in the history of our law, larceny had been defined to be a felonious taking against the will of the owner and with the *animus furandi*—that is the intention to steal—at the time. For this he cited Glanville, Bracton, and the Year-books, from Edward III. to Edward IV. He especially cited Bracton defining larceny as *contrectatio rei alieni fraudulenter, cum animo furandi*, and he dwelt upon the case in the 13 Edw. 4, the case of the carrier, in which all the judges held that a carrier was not liable for taking the whole bulk of a package, though he would be if he "broke bulk," as it was called, that is, opened the package and took out something. So that if he took a pint of wine out of a cask he was guilty, but not if he took the whole pipe. The rule of law he had stated was established, he said, by all the authorities, and he cited 3 Coke Inst., 1 Hale's Pleas of the Crown, Hawkins' Pleas of the Crown, and Foster's Crown law. That being the rule of law, he said, here the prisoner took the coin innocently, and though he dealt with it dishonestly an hour afterward, that did not make him guilty of larceny at common law. In cases of finding, it had been laid down that there was no larceny,

though in modern cases it was held that there was, if the finder knew the owner. *Re* Thorburn, 1 Den. Crown Cas. 387. The cases under this head, however, established the doctrine that a person, to be guilty of larceny, must have intended stealing at the time he took the thing; and if the present conviction was upheld, it would be quite inconsistent with those cases and cause a curious anomaly in the law. It could not, he thought, be held that a mere alteration of intention after the taking made the original taking felonious. The case showed that the first taking—the actual physical taking—must have been felonious in order to make it a case of stealing. In the case of Reg. v. Glyde, L. R. 1 C. C. 139, in 1868, the prisoner had picked up a sovereign and intended to keep it, but did not know the owner, and was held not guilty of larceny. In the cases of finding, the guilty knowledge—the knowledge of the owner—was required to have been at the time of finding and taking up. But in this case Ashwell received the coin honestly, not knowing it was a sovereign. He was, therefore, not guilty of larceny at common law. As to the point as to bailment, he agreed with Smith, J.

HAWKINS, J., said he concurred in the judgment of his brother Cave.

MANISTY, J., agreed with his brother Stephen, after whose able and elaborate judgment he said, he need not add anything. He thought that the prisoner could not properly be convicted of larceny, either at common law or upon bailment, because at the time of the delivery of the coin neither party knew it to be a sovereign, so that there was neither a felonious taking nor a "bailment," *i. e.*, an intentional delivery of a sovereign. In his view, the law was well settled on the subject in the case of Reg. v. Middleton (the case of a man taking up money at a post-office put before him by mistake), and he thought it would be most mischievous if it were now unsettled. That case, in his opinion, covered this case completely, as the prisoner was held guilty, because at the moment he took it up, he took it dishonestly; so that the judges put that as the decisive time—the time of the actual taking—not of a subsequent alteration of intention. The real remedy of the prosecutor was to sue the prisoner for nineteen shillings as money lent. That might be called "technical," but he was prepared to hold that that was the proper course, as the prisoner might honestly have changed the sovereign and was only liable to return the nineteen shillings. Here the taking was lawful, and so the prisoner was not guilty of larceny at common law, neither could he be convicted as a bailee, as there was no bailment of the sovereign.

FIELD, J., also concurred in the opinion that the prisoner was not guilty of larceny and could not be convicted of any crime by our law. He had had the advantage of reading the judgments of his brethren who had held the same view, and they had so abundantly and ably supported it, that he did not think it necessary to add anything in support of it.

DENMAN, J., however, who had tried and reserved the case, said he had come to the same conclusion as his brother Cave and the Lord Chief Justice, whose judgment he had read. If he had thought the case covered by Reg. v. Middleton he should not of course have reserved it, but the opinion of some of the judges referred to by his brother Manisty as conclusive was only a dictum, and a dictum in which he himself had concurred, but did not consider it decisive of this case. The case was stated carefully and designedly in a neutral way; not therefore of course stating a felonious intention at the time of taking, and the very question reserved was whether the jury could rightly find that he was guilty of stealing the coin. On the whole, he thought, there was evidence on which the jury might find the prisoner guilty. There was no doubt as to the definition of larceny, that is fraudulently taking anything with felonious intention; and the question was whether there was a felonious taking. His brother Stephen put it as a case of fraudulent retention after an honest taking, but he denied that such was the case, for it could not be said that the prisoner believed he was taking a sovereign at the time of taking of the coin. There was some ambiguity in the use of the word "taking," and there was no real "taking" of the sovereign by the prisoner until he knew it was a sovereign, and so the case fell within the cases as to finding, in which it was held that if a man found something, and afterward found out the owner and then resolved not to return it, he was then, and not before guilty of larceny; so that the question was not whether he stole it at the time he first took it. He came to the conclusion, therefore, that the conviction ought to be upheld.

LORD COLERIDGE, C. J., then delivered his judgment to the same effect as Cave, J., that the prisoner was guilty of larceny at common law. He doubted whether it could be said that there was a "bailment" in the present case, as bailment meant a "contract," and here there was no contract as to the sovereign. As to the question of larceny at common law, he assumed that there must be a felonious taking, but delivery and taking must be acts into which intention entered. There must be an intentional intelligent taking, knowing what the thing was, and a man could not be said to take a thing when he did not know what it was. It could not be truly said that a man took what he did not know of, and he did not think that it was law. In this case, therefore, he thought that there was no delivery of the sovereign and no taking by the prisoner until he knew what it was, so that here at the time of taking the sovereign as such he intended to steal it, and so took it feloniously, that is the sovereign was taken and stolen at the same moment. The conviction could not be disturbed without overruling the decisions of Lord Eldon in Cartwright v. Green, and of

Parke, B., in Merry v. Green, and the decision of the judges in Reg. v. Middleton. The view he thus took was also in accordance with a case not cited in the argument, Reg. v. Riley (Dearsley's Crown Cases Reserved, 149), which was a distinct authority for upholding the present conviction. In this judgment his lordship said his brothers Grove, Pollock, and Huddleston concurred. There were, therefore, seven judges for affirming and seven for reversing the conviction, and as the rule in this court was *presumitur pro negante*, the conviction would be affirmed.

NOTE.—Larceny is "the felonious taking and carrying away of the personal goods of another."[1] Unless the act falls within the above definition, it is not larceny. The cases are very numerous, and the distinctions drawn are very subtle, and the decisions of the courts cannot always be reconciled. We will call attention to various cases which are held to come under the above definition.

Where one takes his own goods from another, who has special property in them, with intent to charge another person with their value, he is guilty of larceny.[2] The least removal of the thing taken, from where it was before, is sufficient.[3] Taking another's property in sport, by mistake, under a fair color of right, or under direction of one, to whom he believes it to belong, is not larceny.[4]

In one case it was held, that the giving away of his employee's goods in charity by a servant was not larceny.[5] The *animus furandi* must exist at the time of the taking.[6] If a man rightfully gets hold of property, without at the time any intention of stealing, a subsequent conversion is not larceny.[7] Whether the taking must be *animo lucri* is a disputed point, but the better opinion seems to be, that, if the property is taken with the intention to deprive the owner permanently of the use of it, with no advantage to the party taking it, it is larceny.[8]

In every larceny there must be a trespass; so, if the orignal taking was lawful, there can be no larceny.[9] If the property-owner transfers the property intending to pass title, the receiver cannot be guilty of larceny, though the sale was induced by false representations.[10] A fraudulent taking is necessary; no subsequent connection with the property can be larceny, as where one buys the stolen goods from the thief.[11] But if one unlawfully obtains possession of another's property and subsequently converts it intended to steal it, this is larceny. The conversion reverts to the original trespass.[12] A distinction is drawn between the transfer of the title to property and a transfer of the possession. Where the owner voluntarily transfers the title, though induced to do so by fraud, the receiver of it cannot be guilty of larceny. But where only the possession, and not the title, is transferred, he may be guilty of larceny.

If one obtains the possession of property from the owner on false pretenses, intending to appropriate it, his taking is felonious and is a trespass, and his conversion thereof is larceny.[13] If one finds anything, which was lost, and there are no *indicia* about it to disclose the ownership, he is not bound to hunt the owner, and is not guilty of larceny in conventing it; but if it has *indicia* of ownership, his taking is felonious and is a trespass, and his conversion thereof is larceny.[14] Where one parts with possession of property, but expects it to be returned to him, or that it shall be disposed of on his account in a designated way, the following cases hold, that the conversion of this property by the receiver is larceny.[15]

The following cases hold, that the last proposition is not correct, unless the disposition referred to was to be part and parcel of the delivery, and that such disposition not being made, there was no delivery and no transfer of the possession.[16] Where a man purchased a trunk, in which by mistake some clothes had been left, which, when he subsequently found them, he appropriated, it was held, that his taking did not accrue till he found the goods, when the rule as to finding lost property applied, and that he was guilty of larceny.[17] The same ruling, where a man purchased a bureau, in which he found a purse, which he appropriated.[18]

Where a man overpaid another by mistake as to the amount he was giving, the receiver also being mistaken as to the amount, and upon demand to return the excess the receiver refused to do so, it was held that the excess was taken without the owner's consent, and the receiver was guilty of larceny.[19] These last three decisions sustain the case under review, on the theory that there can be no giving and no receiving so as to affect the moral action of men, until it is known what is given and received, until there is an intelligent giving and receiving.

S. S. MERRILL.

1 4 Bl. Com. 230.

2 Palmer v. People, 10 Wend. 165; Wall v. Adkins, 59 Mo. 144; Adams v. State, 45 N. J. 448.

3 2 East P. C. 555; State v. Gazelle, 30 Mo. 92.

4 2 Bish. on Crim. Law, 840-852; Witt v. State, 9 Mo. 671; State v. Waltz, 52 Iowa, 227; State v. Homes, 17 Mo. 379; State v. Mathews, 20 Mo. 55.

5 State v. Fritchler, 54 Mo. 424.

6 Regina v. Box, 9 Car. & P. 126; State v. Wall. 62 Mo. 597; Blunt v. Com., 4 Leigh. (Va.) 689; Keely v. State, 14 Ind. 36; Kuntson v. State, 14 Tex. Ap. 570; Hill v. State, 57 Wi . 377.

7 Reg. v. Riley 14 Eng. L. & E. 544; 2 East P. C. 665; People v. Wood, (Cal.) 16 Rep. 648.

8 Dignowitty v. State, 17 Tex. 521, 530; Warden v. State, 60 Miss. 638; State v. South, 4 Dutch. (N. J.) 177; Keily v. State, 14 Ind. 36; People v. Juarez, 28 Cal. 380; Williams v. State, 52 Ala. 411; Rex v. Cabbage, 1 Russ. & Ry. 292; Rex v. Morfet, 1 Rus. & Ry. 307; State v. Brown, 3 Strohb. (S.C.) 516; State v. Slingerland, (Nev.) not yet reported but found in 6 Crim. L. Mag. 686, where the question is reviewed extensively.

9 Rex v. Hart, 6 Car. & P. 106; Cartwright v. Green, 8 Ves 405; Beatty v. State, 61 Miss. 18; Hall v, Adkins, 59 Mo. 144.

10 Lewen v. Com., 15 Serg & R. 93; 2 East P. C. 816; State v. Watson, 41 N. H. 533; Welch v. People, 17 Ill. 339; Murphy v. People, 104 Ill. 528.

11 McAfee v. State, 14 Tex. Ap. 668.

12 Beatty v. State, 61 Miss. 18; Reg. v. Riley, 14 Eng. L. & E. 544.

13 Pear's Case, 2 East P. C. 685; State v. Williams, 35 Mo. 229; Com. v. Barny. 124 Mass. 325; Lewen v. Com., *supra;* State v. Watson, *supra;* Murphy v. People, *supra.*

14 Regina v. Riley, *supra:* Tanner v. Com., 14 Gratt. 635; State v. Dean, 49 Iowa 73.

15 Murphy v. People, 104 Ill. 528; State v. Anderson, 25 Minn. 66; Farrell v. People, 16 Ill. 506.

16 Rex v. Thomas, 9 Car. P. 741; Rex v. Slowter, 12 Cox C. C. 269; Rex v. McHale, 11 Cox C. C. 32; Hildebrand v. People, 56 N. Y. 394.

17 Robinson v. State, 11 Tex. Ap. 403.

18 Merry v. Green, 7 M. & W. 623.

19 State v. Ducker, 8 Oreg. 394.

## WEEKLY DIGEST OF RECENT CASES.



1. ACTION FOR FRAUD AND DECEIT.—*Party must have Relied upon Fraudulent Representations—Fraud upon Corporation does not Give Creditors Thereof a Right of Action.*—To maintain an action at law for fraud and deceit, it must appear that the injured party relied upon the fraudulent representations. Bigelow on Fraud, 87; Dunn v. White, 63 Mo. 186; 2 Addison on Torts, Wood's ed., p. 412. Where it is conceded that incorporators have committed a fraud upon the corporation, still this does not give to a creditor of such corporation a right of action for fraud and deceit, for the wrong is a wrong to the corporation, and not directed to a creditor. Cooley on Torts, 518. A wrong to a corporation, which may and does affect the credit of the company and the creditors generally, is not a wrong to them as individuals, and they cannot maintain an action as for a tort. Angel & Ames Corp. (11th ed.), § 596-7. *Priest v. White*, S. C. Mo., June 21, 1886.

2. CONTRACTS.—[*Railroads.*]—*When want of Mutuality Cannot be Set Up.*—Where the owner of lands, through or near which it is proposed to run a railroad, binds himself by writing under seal, to convey to the projectors, their associates or successors, all the coal and iron upon and in certain designated lands, and to secure to them the right of way, in consideration that they would construct the road to a named point within a specified time, and a bill filed to compel the specific performance of the contract, the objection that it is wanting in mutuality, because of a stipulation that the projectors should not be liable for damages if they failed to construct the road, comes too late after the completion of the work. *Wilks v. Ga. Pac. R. Co.*, S. C. Ala., December Term, 1885-86.

3. CORPORATION.—*Municipal Corporation—Duties—Negligence—Drainage — Evidence—Drainage — Defective Plan.*—While the duty of the authorities of a municipality in determining the plan of drainage and location of sewers is *quasi* judicial, the construction and repair of sewers in accordance with such plan are simply ministerial duties, and for negligence in their performance the municipality is liable to one whose property is injured thereby. In an action against a municipality to recover for injuries done by an overflow from a sewer, evidence tending to show that the plan upon which the sewer has been constructed by the authorities has not been judiciously selected, is incompetent. In such action evidence of what, in case of a freshet or great fall of rain, would be the consequence of the difference in level between the sewer in question and one connecting with it is inadmissible. *Johnston v. District of Columbia*, S. C. U. S., April 19, 1886, The Reporter, Vol. 22, 7.

4. CRIMINAL LAW.—*Conviction for Murder—Statement of Instruction as to Official Character of Deceased when Officer of State.*—Where the State relies on the fact that the victim of the homicide was an officer in the discharge of his duty, the existence of such fact must be submitted to the jury by an appropriate instruction, and a failure to so instruct is a reversible error. State v. Grant, 76 Mo. 236; State v. Underwood, 75 Mo. 230; 15 Mo. 28. *State v. Hays*, S. C. Mo., June 21, 1886.

5. DEED.—*Adverse Possession.*—A deed by one to land which is in the adverse possession of another is void as against such adverse claimant. When by written agreement between opposing counsel, it is admitted that "the defendant was in the actual possession of the land sued for, claiming the same adversely to the plaintiff and all others," this court cannot infer that the defendant was a trespasser. B. makes a deed to land to D., while N. is in adverse possession thereof: *Held*, that the deed is only void as to N., and as against him the title still remains in B., who may sue for and recover the land, that such recovery will inure to the benefit of D., as the deed from B. to D. is valid as between them. *Nelson v. Brush.* S. C. Fla., June 17, 1886.

6. ———. *Contract — Rule of— Construction of.* —In construing a written agreement in which the parties claim that the words and expressions contain their true intent and meaning, and there is no claim of fraud or mistake, there should be given to each word and expression that plain and obvious meaning which the context and the whole instrument require to make each part consistent with the whole, and which will secure and carry into effect the object of the parties. When a written agreement consists of more than one distinct writing or contract, the different provisions of all the parts should be given due weight in ascertaining the intended meaning of any portion of the same; but if the language is clear and distinct, and the plain and obvious meaning of the words is consistent with the whole instrument, such meaning must be taken as the intended meaning of the meaning of the parties, unless other parts of the agreement not only admit of, but require, a different construction. *Cincinnati, etc. R. Co. v. Indiana, etc. R. Co.*, S. C. Ohio, June 1, 1886, 3 West. Rep. 606.

7. EQUITY PRACTICE.—*Injunction—For what that Writ will lie.*—The remedy by injunction is a preventive one only, and when the act which is sought to be prevented is done and accomplished, if a party is aggrieved thereby, he must resort to some other remedy for redress. This court, on appeal from an interlocutory decree of the circuit court, refusing to grant an injunction, the record showing that the act sought to be prevented had been done and accomplished, after the refusal of the injunction and before the appeal, is without power to afford relief to the appellant, and will not inquire whether the court erred in its decree. There is no error in a judge of the circuit court refusing leave to a complainant who had filed an original bill for an injunction which had been denied by the judge, to file a supplemental bill, when the bill showed that the act which the original bill sought to prevent had been done. *Smith v. Davis*, S. C. Fla., June 17, 1886.

8. ESTOPPEL.—*Pleading.*—When a party claims a former adjudication of matter set up in an action to be an estoppel, such judgment should be plead-

ed; and where the same is not pleaded when it can be, it is not evidence conclusive of an estoppel; and testimony may be given to show the truth. *Meiss v. Gill*, S. C. Ohio, May 11, 1886, 3 West. Rep., 624.

9. EVIDENCE.—[*Charge to Jury Upon.*]—*Credibility of Testimony Submitted to Jury—Exception.*—The credibility of oral testimony is an inquiry of fact, which must be submitted to the jury, except as to those matters of law or fact which are admitted expressly or by implication; hence the rule that in charging juries, it is improper to assume, or state as fact, any material matter which depends on the sufficiency of oral testimony for its establishment. In delivering the opinion of the court upon this point, Stone, C. J., said: "The contestants are usually agreed on many questions, frequently very important questions. These become the incident—an indispensable incident—in the cause; but they are not the real subject in contestation. They are material facts, but they are not disputed facts. If the trial judge, in giving his charge to the jury, were required to state all such non-contested facts in the form of hypothesis, his charges would frequently become cumbersome and confusing, if not misleading. The exception to the rule is, that when the record shows affirmatively that certain facts are clearly shown and not disputed, not made part of the contention, then it is not error if they be assumed in the charge to be facts, and stated as such without hypothesis. Henderson v. Mabry, 13 Ala. 713; Gillespie v. Battle, I5 Ala, 276; Kirkland v. Oates, 25 Ala. 465; S. & N. Ala. R. R. Co. v. McLendon, 65 Ala. 266." *Carter v. Chambers*, S. C. Ala., Dec. Term, 1885-86.

10. FRAUD.—*Misrepresentation — Warranty — Patent defects.*—On a sale of chattels, a misrepresentation of a material fact by the vendor, on which the purchaser has a right to rely, and on which he does in fact rely, as an inducemeut to the contract, is a fraud, and furnishes a defense to an action for the purchase-money, or a separate cause of action in favor of the purchaser. A representation which is in the nature of an expressed opinion does not constitute a fraud, unless it was knowingly false, made with intent to deceive, and accepted and relied on as true; and when made under these circumstances, it may often constitute a warranty. Whether the representation is intended as a statement of a fact, or as the mere expression of an opinion, when it does not involve the construction of a written instrument, is a question for the determination of the jury. Although representations and warranties do not cover patent defects, such as are external and obvious on casual inspection; yet the purchaser may rely upon the warranty except as to such defects, and is not found to make any examination. In the absence of fraud or a warranty, the purchaser must offer to restore the goods, before he can defeat an action for the price; but, in an action for the purchase-money, he may set up the defense of fraud, or want of consideration, without offering to restore the goods, or to rescind the contract. *Brown v. Freeman*, S. C. Ala. May 18, 1886.

11. INNKEEPER.—*Lien for Board—Property of Third Person Received as Property of Guest.*—An innkeeper who receives a piano in his character as innkeeper, and as the property of his guest, is entitled to his lien against the piano for board and lodging furnished his guest, although the piano is in fact the property of a third person. *Cook v. Prentice*, S. C. Oreg. June 1, 1886. 11 Pac. Rep. 226.

12. Insurance.—*Life Insurance—Mutual Relief Association—Beneficiary's Name Inserted after Assured's Death—Omission.*—The name of a proposed beneficiary may be inserted in a certificate of membership in a mutual relief association after the assured's death, when it is shown that both he and the officers of the association understood, when he made his application, that the proposed name should be entered on the record without further direction. *Scott v. Provident etc. Ass'n.*, S. C. N. H. March 12, 1886. 4 Atl. Rep. 792.

13. JOINT TENANTS AND TENANTS IN COMMON.—*Tax Title Acquired by Co-Tenants—Statute of Limitations- Rents Received by Co-Tenants—Evidence—Taxation—Tax Deed—Presumption of Validity—Description in Deed—Sufficiency of.*—The purchase of land sold for taxes by a tenant in common, who is in possession, and receiving the rents and profits, vests no title to the land in such purchaser, against his co-tenants, nor entitles him to invoke the statute of limitations in aid of his claim of title. Evidence of the amount of rents received by a co-tenant in possession is admissible, in a suit wherein such co-tenant claims title through a tax sale. Section 90, *c.* 57, Misc. Laws, making a tax deed good in certain cases, does not extend to a case where the party taking the deed had no right to take it. Premises described in sheriff's deed as "Minter's donation, T. I. S. R., 2 west, 320 acres," *held* sufficient, where there is a parcel of land in said township answering to the description, and no similar piece of land in the township. *Minter v. Durham*, S. C., Oreg. June 1, 1886. Pac. Rep. Vol. 11, 23.

14. ——— ——— ———.*Account—Evidence—Res Adjudicata—Evidence—Parol Evidence—Deed—Ambiguity.*—The parties are tenants in common of the strip of land in question; plaintiff owning seven twenty-sevenths and defendant twenty twenty-sevenths. The defendant has absolutely excluded the plaintiff and his testator, against their objection, from all use and benefit of one-half part thereof since 1875, and the remainder has been and is occupied by both parties as tenants in common. *Held*, that under Pub. St. R. I. *c.* 236, the plaintiff is entitled to an account. He had an undoubted right to the use of the entire strip in common with the defendant, and the latter could not assume the right, because of his larger ownership therein, to make partition thereof, and thereby exclude his co-tenant from any particular part. *Held, further*, therefore, that evidence to show the plaintiff had the use and benefit of fully seven twenty-sevenths is inadmissible. In a previous suit between the same parties, the title to the same strip of land was passed upon by the court. *Held*, that, although it was not strictly necessary for the court to have passed upon the question, it was now *res adjudicata*; the point having been distinctly raised by the pleadings, fully argued by counsel, and deliberately passed upon by the court. The usual rule applied, that parol evidence is admissible to explain an ambiguous deed, or repugnant clauses therein. Almy v. Daniels, 11 R. I. 250, and Waterman v. Andrews, 14 R. I. 589, affirmed. *Almy v.* Daniels, S. C. Rh. I. May 13, 1886, 4 Atl. Rep. 753.

15. JURY.—*Grand Jury—Contempt by Witness—Appeal—Criminal Law—Indictment by Grand Ju-*

*ry de Facto—Validity—De Facto Jury—Contempt of.*—A grand jury is a part of the court by which it is convened, and is under its control, and witnesses who appear before it are subject to the lawful authority and control of the court in the same manner as are witnesses before a trial jury. The court has, therefore, jurisdiction to deal with a witness who defies the authority of the grand jury, and to adjudge him guilty of contempt of court for such conduct, and punish him therefor, and if no excess of jurisdiction appears in the proceedings which resulted in the conviction and punishment, the judgment rendered is final and conclusive, and not the subject of review. An indictment found by a *de facto* grand jury is regular as one found by a *de jure* grand jury. Tne tide of one is not collaterally assailable any more than that of the other. The validity of the *de facto* grand jury cannot be called into question in a collateral proceeding to punish a party as a contumacious witness for defying its authority. *In re Gannon*, S. C. Cal. May 22, 1886. Pac. Rep. Vol. 11, 240.

16. LANDLORD AND TENANT—*Lease—Execution by Agent—Tenant at Will—Use and Occupation—Evidence — Covenant — Dependent Covenants.*—Where an agent, without authority from his principal, executes a lease in his own name an "agent," and the lessee executes it, no term vests in him, and his covenants cannot be enforced against him. If, in such a case, the lessee enters, he is a tenant at will, liable to the lessor for use and occupation, and the lease is admissible in evidence on the question of value. In many cases when a deed contains covenants on both sides, the covenants being in consideration of each other, the one executing the deed may be bound, although the other has not executed it; but, when the covenants are dependent, the one executing the deed is not bound until performance by the other party. *Jennings v. McComb*, S. C. Penn. May 10, 1886, 4 Atl. Rep. 812.

17. LIBEL AND SLANDER.—*Publication in Judicial Proceeding Privileged.*—The publication in an insolvency proceeding by an attorney, in the course of his employment as such, of facts of which he was informed by his client, to the effect that the insolvent, while acting in a fiduciary capacity, committed acts of fraud in contracting debts for which he became insolvent, it being his duty, in resisting for his client as an opposing creditor the application of the debtor, to publish the facts, constitutes an absolutely privileged publication, of which malice cannot be predicated, no one being permitted to allege that what was rightly done in a judicial proceeding was done with malice. *Hallis v. Maux*, S. C. Cal. May 26 1886, Pac. Rep. Vol. 11, 248.

18. LIMITATIONS.—*Statute of Limitations—Disability* Where defendant, a resident of Austria, there accepted a bill and soon after absconded from there and came to this State and hid himself here, under an assumed name, for more than six years, he can not be said to have been during that time "without the State," within the meaning of the Statute of Limitations. Although the statute is resorted to defeat a just claim, it must have its operation. Its plain language cannot be preverted, to remedy the hardship of any particular case. Where the debtor was continuously within the State for more than six years after the cause of action accrued, he cannot be deemed to have been without the State, and thus the running of the statute defeated, because he concealed his abode, and thereby his creditor was unable to discover him and serve him with process. *Engel v. Fischer*, N. Y. Ct. App., June 1, 1886, 3 Cent. Rep. 303.

19. MASTER AND SERVANT—*Servant's Negligence—Combined Negligence of Servant and Defendant.*—By intrusting his team to a servant, in the prosecution of his business, the plaintiff assumes the risk of the servant's negligence in protecting it against the negligence of third parties; and if the servant negligently leaves the team unattended, to engage in a personal combat with the defendant, and the horses, frightened by the noise, run away, and damage the carriage, the defendant is not liable therefor, though his conduct contributed to it. *Page v. Hodge*, S. C. N. H., March 12, 1886. 4 Atl. Rep. 805.

20. NEGLIGENCE—*Evidence—Physician and Patient, Privileged Communication, Waiver of—Injury to Wife, Husband may Sue Alone and Recover damages for Loss of Services, His Own Time and Society of his Wife.*—It is competent for a patient to waive the protection of § 4017 R. S. 1879, of Mo. and allow an attending physician to testify as to statements made to such physicion, in reference to sickness or injuries of such patient. And even though the patient be dead, it has been held, that those who represent him after his death may do the like, for the protection of the interest they cliam under him. 42 Mich. 206. And the right of waiving the privilege is as broad as the privilege itself. A husband may sue alone for injuries to his wife and recover for loss of services, although the contract to carry the wife safely was made with her alone, and the failure to do so resulted in the tort growing out of the breach of contract. 2 Rorer on R. R. 1093, 1094, 1095; 21 Com. 557; 4 Iowa, 420; 75 N. Y. 192; 26 Iowa, 124; 36 N. H. 9; 2 Thomp. Neg. 1240 § 15; 49 N. Y. 47; Cooley on Torts, 226, 227 and cases cited. The *gravamen* of such an action of the husband being a breach of duty by the common carrier, privity of contract is not essential. "Anyone sustaining damages by reason of such breach of duty, may maintain his action therefor. In such case the tort does not spring from, nor arise out of a breach of contract, but the action lies against the carrier on the custom of the realm." 7 Eng. L. & Eq. 519; 12 East 89; 18 Eng. Com. L. Rep. 227; Bliss on Code, Pl. § 14; 117 Mass. 541; 78 Mo. 245. And cases like this, where the husband is compelled to attend his wife, he may recover damages for the loss of his time while so attending, (Smith v. City, 55 Mo. 456) as well as for the loss of his wife's society. 2 Rorer on R. R. 1094-1095; 4 Iowa, 420; 21 Com. 557; Cooley on Torts, 226. *Blair v. Chicago & Alton R. R. Co.*, S. C. Mo., June 21, 1886.

21. ———. *Instruction—Erroneous—To Seem to authorize Jury to Establish their own Standard of Care.*—In an action against a railroad company for injuries received by being run over by one of its trains, a new trial will be granted when the charge of the court tends to create in the minds of the jury the impression that they may go beyond the general inquiry as to reasonable care and diligence and establish some particular standard of their own. *Springman v. Baltimore etc. Co.*, S. C. Dist. Columbia, April 19, 1886. 3 Cent. Rep. 281.

22. PRACTICE—*Pleading.*—The transcript of the proceedings should show affirmatively the making of

an intermediate order which it is sought to have received on appeal. Where one of the errors assigned is the making of an order striking out a plea, and a statement of the making of such order in and as one of the grounds of a motion for a new trial is the only showing in the record that such an order has been made, and it appears that such motion has been denied by the circuit court, the fact that such an order has been made by the circuit court will not be assumed, nor can a review of the alleged order be based on the mere statement in the motion. Where the only plea or where all the pleas to the declaration are of new matter and there is no replication and consequently no issue of fact, it is error to submit the case to a jury for trial; and such error may be taken advantage of primarily on appeal. *Livingston v. L'Engle*, S. C. Fla., June 17, 1886.

23. RAILWAY COMPANY— [*Charter*] *Abuse of Corporate Franchise — Objection made in Name of State.*—The objection that a railroad corporation is not authorized by its charter to acquire any easement or interest in lands not necessary for the operation of its road, can only be raised by the State in a proceeding for the abuse of corporate franchise, and is not available in defense of a suit for the specific performance of a contract. "The weight of modern authority is that such objection can not be raised collaterally, but can only be made at the instance of the State, for the abuse of corporate franchise. Waterman on Spec. Per. § 226; Kansas City Horse R. R. Co. v. Horel, 79 Mo. 632; S. C. 20 Am. & Eng. R. R. Cas. 17, and note; Parish v. Wheeler, 22 N. Y. 494; Thompson v. Lambert, 44 Iowa, 239; Wilcox v. Toledo etc. R. R. Co. 43 Mich. 534; *Wilks v. Ga. Pacific Ry. Co.*, S. C. Ala. Dec. Term, 1885-86.

24. REPLEVIN—*Bond-Undertaking — Construction of*—The condition of an undertaking executed by a defendant in action for the recovery of chattels, for the purpose of reclaiming them, does not become fixed and determined until the final determination of the action, and if there be an appeal, not until the appeal has been disposed of. Such undertaking may be allowed to be amended in furtherance of justice. Objections to the form of the undertaking properly arise upon the application for its allowance, and amendments thereto may then be allowed. *Corn Exchange Bank v. Blye*, N. Y. Ct. App. April 27, 1886. 3 Cent. Rep. 301.

25. TAXATION. — *Jurisdiction — Tax Sale.*—Under the act approved February 12, 1879, providing for the sale of lands for delinquent taxes, the powers conferred on a probate court are special and limited; and to sustain a decree of sale, the record must affirmatively show jurisdiction both of the subject-matter and of the person. The statute requires that notice, the form of which is prescribed, must be served upon the owner, his agent or representative, or left at his residence; or, if the owner is unknown, or is a non-resident, must be given by publication; and such notice is preliminary and essential to jurisdiction of the person. The lands being assessed to "Est. Robert Carlisle, reputed owner," the notice directed in the same way, and returned executed by leaving a copy, "at residence of Robert Carlisle;" the court has no jurisdiction to order the sale, when it is shown that Robert Carlisle died many years before, that his estate had been finally settled and distributed, and that the lands were, at the time of the assessment, in the possession of purchasers from his heirs. *Carlisle v. Watts*, S. C. Ala., May 18, 1886.

26. TRUST.—*Equity—Will—Pleading.*—Where property is bequeathed to a trustee, to be taken care of, and the profits and interest to be paid annually to the testator's married daughter, "for the use and support of herself and her children during her natural life, and at her death the whole of said property to go and become the absolute property of her lawful heirs;" the daughter and her children may join a bill for an account and settlement of the trust, the removal of the trustee, and the appointment of another in his stead. When a trustee is appointed by the register in chancery, gives bond, and enters on the discharge of the duties of the trust, and a bill in equity is afterwards filed by the beneficiaries, charging waste and loss of the trust funds, asking an account and settlement, the removal of the trustee, and the appointment of another; he and his sureties are estopped from denying his liability to account, on account of any informality in his appointment. The defense of the statute of non-claim may be taken by demurrer, when the bill seeks to enforce a demand which is *prima facie* within the statute, and does not aver presentation, nor state facts which avoid the bar. Under a bond executed by a trustee appointed by the register in chancery, conditioned for the faithful performance of his duties, a liability does not accrue to the beneficiaries against the sureties until there has been a default by their principal, and the statute of non-claim (Code, § 2597) does not begin to run until such default. *McDowell v. Brantley*, S. C. Ala., July 2, 1886.

27. WILL.—"*Male Issue*," *Interpretation—Ejectment.*—A testator devised land to his daughters for life, and, at the death of the survivor of them, "to the male issue then living of my said son, Richard, their or his heirs and assigns, in fee; but, if no such issue shall then be living, in such case I give the same unto all the children of my said daughters, Catherine and Sarah, and my said son, Richard, their heirs and assigns, in equal parts, according to the number of them." Testator's son, Richard, was not married at the time of testator's death, and the daughters died unmarried and without issue. An action of ejectment having been brought by one of Richard's daughters, as heirs to her son, against her two brothers, *held*, that the words "male issue" in the will denoting the whole class of male descendants, whether descended through males or females, and the plaintiff's son coming within that class, she was therefore entitled to recover his share. Wistar v. Scott, 105 Pa. St. 200, followed. *Wistar v. Gillilan*, S. C. Penn., Feb. 8, 1886, 4 Atl. Rep. 815.

## QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

### QUERIES.

11. A. B. & C. sign a petition for dramshop license; § 4 of Dramshops, session Acts, 1883, of Mo. C. after-

wards reconsiders his action and in writing, petitions the county court to cause his name to be erased from or held for naught on dramshop petition. His plea being filed before the 4th day of July, and before action had on dramshop petition, should the court grant his prayer? J.

12. A lease for a store-room made for one year, contains the following covenant: "And that the party of the second part shall have the privilege of leasing the above described premises for two more years, after the expiration of this lease, at the same rate per annum." After the year for which the lease was made, the lessee keeps the premises for ten months, pays the same rent per month, and in manner as described in said written lease. The tenant now leaves the premises; can the landlord hold him for the two years rent? Is not the keeping of the premises for ten months and paying in accordance with the terms of the lease, a ratification on the tenants' part and a contract for two years' more leasing? Or does the case come within the statute of frauds? Cite authorities. G. & F.

## QUERIES ANSWERED.

*Query 36.* [22 Cent. L. J. 310.] A corporation organizes with a capital stock of $50,000, $45,000 is paid in cash, and after the concern has been running some time, the appraisement of the real estate is increased $5,000, and stock to that amount issued to the stockholders in proportion to the amounts then held by them, no money being paid for said increase. Afterwards the concern promulgates a statement showing a surplus of $15,000. Shortly after making this statement the capital stock is increased, and the new stock is sold, the statement of the affairs of the concern being used to induce persons to purchase the stock. Two years later the concern becomes insolvent. Are the original stockholders liable to purchasers of the new stock, who had no notice that the $5,000 represented "water" nor that the surplus consisted of worthless paper, and if so, what would be the measure of damages?

*Answer.* If the value of the property of a corporation has increased, the corporation can issue *pro rata* to its stockholders new paid up stock to that amount, or can apply it in the same manner as a payment on stock not fully paid up. Howell v. Chicago & N. W. R. R. 51 Barb. 378; Morawitz on Corp. § 349; Kenton F. R. & M. Co. v. McAlpin, 5 Fed. Rep. 737. Since it is not stated, that the real estate had not increased $5,000 in value, nor that the corporation did not have a surplus of $15,000, we cannot see that any wrong has been done, or that any one is liable. If, however, both these representations were fraudulent, an action for deceit may be maintained, but it must be shown, that the person charged made the representations, that they were false to his knowledge, and that these representations were relied on and were the inducing cause for parting with the property. Arthur v. Griswold, 55 N. Y. 400; Wakeman v. Dalley, 51 N. Y. 27. It would be difficult to hold any stockholder to any liability for deceit relative to a third party for the reports made to the corporation or for its proceedings, all of which concern and are intended for the corporation alone. To hold a party for deceit he must have been guilty of it personally, or must have authorized the use of his name for that purpose. S. S. M.

*Query* 13. An attorney in California collects money from an estate there, for the widow who resides here. She died and the attorney refuses to pay over to her administrator. How can the money be collected, and what steps should the administrator take to enforce the collection? SUBSCRIBER.

Shelbyville, Ill.

*Answer* An attorney in California is not obliged to account or pay money to the administrator of his client, appointed in Illinois. The following extract from the California Code of Civil Procedure, § 1913 is conclusive on this point.

"——The authority of a guardian or committee, or an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with his authority."

The attorney is only responsible to an administrator of his client appointed in California, and therefore the proper way to get the money out of his hands, is to have an administrator appointed in California, who can collect the money and pay it over to the person who can show to the satisfaction of the proper California court that he is entitled to it.

Under the law of California, an absentee who is entitled to receive property or money from an administrator, may appoint an agent to receive it. Or if he does not, the court will appoint an agent to take possession for the absentee, the agent in such case must give bond and is entitled to compensation. Cal. Code Civ. Proced., §§ 1691, 1692.

## RECENT PUBLICATIONS.

ELEMENTS OF RIGHT, AND OF THE LAW.—To which is added an historical and critical essay upon the several theories of jurisprudence. By George H. Smith. *Ante omnia videndum est quid sit justitia, quid jus, quid jurisprudentia.* PANDECTS. San Francisco: A. L. Bancroft & Co., Law Publishers, Booksellers and Stationers. 1886.

This is not a law book in the sense in which we usually employ that term, nor, indeed, in any other sense. It is properly a philosophical treatise upon those fundamental principles of right which underlie all positive human law, those principles which all law-givers of all nations, and of all ages, have recognized as the *substratum* upon which they must needs erect their systems of polity. This *substratum* is justice, taken in both senses, the general sense in which it is, according to Aristotle, synonymous with virtue, and includes everything meritorious in human action: and the particular, which is merely a limitation of the operation of this broad principle to limited and special circumstances, things and persons. Right in its broadest sense is the correlative of justice, what the latter must accord may be demanded in the name and by virtue of the former. Upon these correlated principles is founded all human government, and from them are derived all the multitudinous details of the administration of law, in all its various forms.

Upon these general principles are founded the theories of the author on the functions of government in the administration of justice, the enforcement of rights and the redress of wrongs.

It would be inappropriate, in a cursory notice like this, to attempt anything like a thorough analysis of the views on these abstract subjects which the author has evolved with so much labor and thought. It must suffice to indicate the general course of the treatment of the subject which he has adopted. In his first Book he proposes to treat of the "Elements of Right," of the

function of government with reference to the administration of justice, of the classification of rights, their relation to morality, their origin, as by contract, custom, or otherwise, their character as public or private, and their relation to persons and to things. His second Book treats of the "Elements of Law," including, as well, the *jus gentium*, as the municipal law ordinarily enforced in courts. This division of the subject is less vague and indefinite than the former, the author sketches the origin and progress of the common law of England, and the influence of the Civil Law upon it. The third Book is devoted to an "Historical and critical review of the several theories of Jurisprudence."

Our space will not permit us to say more than to repeat what we have already said, that this is not in any proper sense a law book, although it purports to treat of Law and of Jurisprudence; it is really a philosophical treatise on those subjects, and as such, we commend it to those persons who have the leisure and inclination to devote themselves to studies of that description.

## JETSAM AND FLOTSAM.

ALTERNATIVE SERVICE OF PROCESS.—The following return, made by a very conscientious officer, shows that he was determined to do his whole duty and take all the chances. We are a little curious to know what Mrs. Smith did with the copy of the summons left with her for her dead husband, and how the sheriff expected that the copy would reach the hands, or come to the knowledge of the deceased. We venture to say that if Mr. Smith in his new *status* had been as conscientious as the sheriff, and had taken it into his head to "materialize," and "personally to be and appear" as required by the terms of the summons, there would have been a very badly frightened court.—ED. CENT. L. J.

"Received this summons on this 9th day of June, 1885, at 5 o'clock P. M., and served the same in my county, —— ——, on the 16th day of June, 1885, on the within named defendant, Jane Smith, by delivering to her in person a true and certified copy of this summons, with all the indorsements thereon. John Smith is dead, but a copy of said summons was left by me at his usual place of residence, with Jane Smith, for him. —— ——.

June 19, 1885. Sheriff.

CONFOUNDING THE PRONOUNS. — The following squib is as old as the hills, but perhaps some of the juniors have never heard it:

A policeman who had arrested a man for disorderly conduct was trying to tell his story as a witness in court against the culprit, when the judge interrupted with this inquiry:

"What did the man say when you arrested him?"

"He said he was drunk."

"I want his precise words, just as he uttered them. He did not use the pronoun *he*, did he?"

"Oh, yes, he did; he said he was drunk—he acknowledged the corn!"

*The Court* (getting impatient at witness' stupidity)—"You don't understand me. I want the words as he uttered them. Did he say, "*I* was drunk?"

*Witness* (zealously)—"Oh, no, your honor; he did'nt say you was drunk. I wouldn't allow any man to charge that upon you in my presence!"

A fledgling attorney, occupying a seat in the court, here desired to air his powers, and said, "Pshaw! you don't comprehend at all. His honor means, Did the prisoner say to you, '*I* was drunk?"

*Witness* (reflectively)—"Waal, he might have said you was drunk; but I didn't hear him.

*Counsel for the prisoner*—"What the court desires is to have you state the prisoner's own words, preserving the precise form of pronoun he made use of in his reply. Was it in the first person, *I*; second person, *thou* or *you;* or in the third person, *he*, *she* or *it*? Now then, sir (with severity)—upon your oath, did not my client say, "*I* was drunk?"

*Witness* (getting angry)—"No, he didn't say you was drunk neither. D'yer suppose the poor feller charged the whole court with being drunk?"

A LAWYER NEATLY CAUGHT. — A young Toledo lawyer has been sent to the workhouse for kissing a girl with whom he was voyaging in an elevator. It is not chronicled that the damsel's features were the pouting challenge which sometimes provokes, if not justifies, such a liberty, dangerous as the liberty may prove; in fact, as far as we know, not a word of explanation for the culprit has gone abroad. The only inference to be drawn thus far is that Toledo's young ladies are not to be kissed without their consent. Perhaps when this manacled limb of the law emerges from captivity, if he be at heart a gentleman and the young woman be fancy free—well, who knows what romance may follow? At any rate, here is a hint to novelists.

[And were it known that he remained several months, having haughtily declined an offer for "pardon on condition of his promising to have nothing more to do with the girl," tendered him on the third day of his confinement, it were still a better "hint to novelists." Verily chivalry is not dead yet, and the profession, in the person of Mr. ——, lays claim to the most chivalric man of the age].

IN an action for breach of promise of marriage tried recently in the queen's Bench Division, the plaintiff's counsel read the following letter: "My dear Nellie—I hope to have a letter in the morning from my dear Nellie. The wind and weather here are something D——D——D——."— Mr. Justice Hawkins: What does that mean?—Mr. Austin: I think it is for your lordship to construe written documents.—*Irish Law Times*.

IN these times of bribery it is well enough for lawyers to know just how far they can safely go in social attentions to the judges. When Edward I returned to England in August, 1289, his first care was to reform the abuses that had crept into the administration of the law during his absence. All the judges were examined before the new parliament, and on proof of extortion were fined; only two judges out of the whole bench were found not guilty. From this time the judges were obliged to swear upon their introduction to office, that they would take no money or presents of any kind except at breakfast from such persons as had suits depending before them. We may thereupon conclude that to treat a judge to a breakfast is not bribery at common law. Drinks are not mentioned. Probably from their effects they would not come within the same category. Arm chairs were ruled out in Judge Barnard's case. Ex.